No. 87-352-CSX
Status: GRANTED

Title: Sun Oil Company, Petitioner
v.
Richard Wortman and Hazel Moore, etc.

Docketed:
August 28, 1987

Court: Supreme Court of Kansas

Counsel for petitioner: Sawatzky,Gerald

Counsel for respondent: Chapin,W. Luke, Rosenthal,Brent M., Penny,Gordon

Entry	Date	Note	Proceedings and Orders
1	Aug 28 1987	G	Petition for writ of certiorari filed.
2	Sep 26 1987		Brief of respondents Richard Wortman, et al. in opposition filed.
3	Sep 29 1987		DISTRIBUTED. October 16, 1987
4	Sep 29 1987		REDISTRIBUTED. October 16, 1987
5	Oct 2 1987	X	Reply brief of petitioner Sun Oil Co. filed.
6	Oct 19 1987		Petition GRANTED.
			**********
7	Nov 20 1987		Record filed.
		*	Certified copy of original record received,4 vols.
8	Dec 1 1987		Joint appendix filed.
9	Dec 1 1987		Brief of petitioner Sun Oil Co. filed.
10	Dec 3 1987	G	Motion of GAF Corporation for leave to file a brief as amicus curiae filed.
12	Dec 21 1987		Order extending time to file brief of respondent on the merits until January 19, 1988.
13	Jan 19 1988		Brief of respondents Richard Wortman, et al. filed.
14	Jan 19 1988	G	Motion of Wiley Goad for leave to file a brief as amicus curiae filed.
16	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 22, 1988. (4th case).
15	Feb 8 1988		CIRCULATED.
17	Feb 18 1988	X	Reply brief of petitioner Sun Oil Co. filed.
18	Feb 22 1988		Motion of GAF Corporation for leave to file a brief as amicus curiae GRANTED.
19	Feb 22 1988		Motion of Wiley Goad for leave to file a brief as amicus curiae GRANTED.
20	Mar 21 1988	X	Supplemental brief of respondents Richard Wortman, et al. filed.
21	Mar 22 1988		ARGUED.
22	Mar 25 1988	G	Motion of petitioner for leave to file a supplemental brief after argument filed.
23	Apr 4 1988		Motion of petitioner for leave to file a supplemental brief after argument GRANTED.

87-352 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608
Attorneys for Petitioner

Date: August 28, 1987

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Do the Due Process Clause, and the Full Faith and Credit Clause of Article IV of the Constitution, require the forum state to apply the limitations law of the state where the claim arose and claimant resides? In this connection, should *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953), be overruled; or should *Wells'* broad dictum that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state" be circumscribed to apply only when the forum state's limitations statute is shorter than that of the state wherein the claim arose?

2. Under the holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require the law of Texas and of other states to be applied to claims for interest arising in each of those states, in a Kansas multi-state class action, (a) must the limitations laws of the states wherein the claims arose be applied; and (b) can the forum state constitutionally evade the interest rates specified by the other states for similar claims, by ruling that each of the other states would adopt the theory of interest law adhered to by the forum state?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Sun Oil Company[1] prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Kansas entered in these proceedings March 30, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (241 Kan. 226, 734 P.2d 1190) is set forth at page A1 of the Appendix. The court's modification of such opinion, and denial of the motion for rehearing, immediately follows at page A12. The unpublished decision and judgment of the District Court of Barber County, Kansas, is set forth on page A14 of the Appendix.

1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix on page A31.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on March 30, 1987. A motion for rehearing was filed on April 17, 1987, and was denied, along with a modification of the opinion, on June 8, 1987. The Petition for a Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

This Court, in *Sun Oil Company v. Richard Wortman, et al.*, No. 84-1971, 106 S.Ct. 40 (October 7, 1985), vacated the judgment of the Kansas Supreme Court reflected in *Wortman v. Sun Oil Company*, 236 Kan. 266, 690 P.2d 385, for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985). Both *Phillips* and this case were multi-state class actions by royalty owners under gas leases, in which virtually all the claims for interest arose in states other than Kansas between non-residents of Kansas, concerning gas production in states other than Kansas. The Kansas Court had ruled that all class member claimants were entitled to recover interest provided by Kansas law.

In *Phillips*, this Court ruled that the Due Process Clause and the Full Faith and Credit Clause required Kansas to apply the laws of each of the other states in which the claims arose, it appearing that the laws of Texas, Oklahoma and Louisiana, provided different, lower rates of interest on similar claims. (472 U.S. at 817).

While *Phillips* involved only the issues of liability, and the appropriate rates for interest, this *Wortman* case also involved Sun's defense that a large portion of its alleged liability, arising from Sun's July, 1976, payment of the royalty principal more than three years prior to commencement of the suit in August, 1976, was barred by the statutes of limitations of the other states. Sun argued that the Kansas borrowing statute, K.S.A. 60-516, applicable to out-of-state claims between nonresidents, required Kansas courts to apply the foreign states' limitations statutes; but if not, those limitations statutes governing claims arising in each of the other states must be applied under the Due Process Clause and the Full Faith and Credit Clause of the federal Constitution.

In its first, vacated, decision the Kansas Supreme Court held that the Kansas five year limitations statute was applicable to all claims. It did not consider the limitations laws of the other states in which virtually all claims arose and all claimants resided. (236 Kan. at 270, 690 P.2d at 390).

After remand by this Court, the Kansas Supreme Court in turn remanded back to the state district court

for further consideration. The district court's further consideration consisted of copying *verbatim* the requested findings and conclusions submitted by plaintiffs. The district court determined that each of the other states would adopt the same theory of interest developed by the Kansas courts. Sun's limitations defense was rejected without discussion of Kansas' borrowing statute, or of the federal constitutional issue raised concerning the limitations laws of the other states. (A18, A23-24).

On February 25, 1987, the Kansas Supreme Court decided *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286, on remand from this Court's *Phillips* case, supra. That decision re-affirmed the same rates of interest as to out-of-state claims, as had been applied by Kansas law, on the assumption that each of the other states would uniformly adopt the Kansas theory. This was despite the Texas Supreme Court *Stahl* decision applying a lower 6% interest rate to identical claims, and a later Texas case construing *Stahl* as not allowing interest higher than 6% based on "equitable" grounds. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. S.Ct. 1978); *Mo.-Kan.-Tex.R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (Tex. Civ. App. RNRE, 1986). Most of the class members' claims arose in Texas. In a curious twist, the Kansas court also ruled that the differing post-judgment interest rates of each of the other states should apply to their respective portions of the Kansas judgment—although that issue was not previously before this Court and was never raised by the parties.

The Kansas Supreme Court then held that this *Wortman* case was governed, after this Court's earlier remand, by the foregoing *Shutts* decision, as to the uniform pre-judgment interest rates applicable to claims arising in all the

states. (A5-A6). The court ruled that, although "opt-out" forms allowing class members to exclude themselves from the class, constitutionally required by this Court in *Phillips*, had not been sent prior to judgment with the earlier notice to class members, it was sufficient to send opt-out forms to class members after judgment on the merits had been entered. (A8).

Finally, the Kansas court rejected Sun's contention that the Full Faith and Credit Clause and the Due Process Clause of the Constitution required the limitations statutes of the states in which the claims arose to be applied to claims arising in those states between non-residents of the forum state. Reciting the oft-repeated view that limitations laws are "remedial or procedural", the court held that this Court's *Phillips* decision did not require application of the other states' statutes of limitations. (A10-A11). It applied the Kansas five year statute, although the limitations laws of Texas, Oklahoma and Louisiana, representing over 90% of the claims, would bar those claims arising from Sun's July, 1976, payout of royalty principal.[2]

The Kansas Supreme Court denied Sun's motion for rehearing but modified its opinion by construing the Kansas borrowing statute, K.S.A. 60-516[3] to be inapplicable,

> "because it applies only where the cause of action has arisen in another state. Here, the cause of action arose

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2. Two year statute: Vernons Texas Statutes, Art. 5526, *Hull v. Freedman*, 383 S.W.2d 236 (Tex. Civ. App. 1964). Three year statutes: 12 Okla. Stat. Ann., Sec. 95; La. Civ. Code, 3538, *O'Neal v. Union Producing Co.*, 253 F.2d 157, 158, n. 2 (5th Cir. 1946).

3. K.S.A. § 60-516 provides: "Where the cause of action has arisen in another state or country and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued.

in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi." (A12-A13).

The court failed to explain how over 3,000 individual claims by class members, arising separately in each of six different states, became part of a single "cause of action" by the multi-state class. This lumping of over 3,000 claims into one "cause of action" demonstrates Kansas' imposition of its own laws on claims arising elsewhere.

REASONS FOR GRANTING THE WRIT

I. The Artificial Judicial Classification of Limitations Statutes As Procedural and Remedial, in Applying the Full Faith and Credit Clause of the Constitution, and the Due Process Clause, Is Wrong. Conflict and Confusion in State and Federal Court Decisions, and Indiscriminate Forum-Shopping by Litigants, Are the Unhappy Results.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984), the present issue was left open for future decision. This Court referred to strong academic criticism of the rule that limitations statutes are considered "procedural" by the forum state, thereby entitling the forum to apply its own statute of limitations:

> ". . . There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. See, e.g., R. Weintraub, Commentary on the Conflict of Laws Sec. 9.2B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 221 (1976); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale LJ 492, 496-497 (1919). But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation." (Footnote 10).

These critics agree to the proposition stated by the author in the Comment in 28 Yale L. J. 492, 496 (1919):

> ". . . After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere. Nor is there any policy pointing to a different conclusion."

Weintraub's *Commentary*, Sec. 9.2B, p. 517, also concludes:

> ". . . [I]t seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own longer statute to extend the limitations period. Such conduct serves no substantial interest of the forum."

Professor Martin agrees:

> ". . . [A] state should be forbidden from entertaining a cause of action after it is dead in the state which created it." (61 Cornell L. Rev. at 221).

Both Martin and Weintraub, however, concede that a forum state may constitutionally apply its *shorter* limitations statute since it would not bar an action where the claim arose, and local policy reasons might justify such a dismissal not on the merits. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), affirmed the application of a shorter statute of limitations in the forum state, over constitutional objections. In so ruling, however, the 5-3 majority opinion recited the broad dictum that:

"Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." (345 U.S. at 517).

The dissent by Justices Jackson, Black and Minton noted that the historical development classifying limitations statutes as procedural was inapplicable to the constitutional issues. Pointing out the ill-advised encouragement of forum-shopping by the majority rule, the dissent predicts "possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson,* (US) 16 Pet. 1, 10 L.ed. 865, ever held." (345 U.S. at 522).

The dissent then expresses the apprehension that the majority logic might go so far as to permit a forum state to apply its *longer* limitations statute, though the action was dead where it first found life:

". . . Suppose even now she [plaintiff] can get service in a state with no statute of limitations or a long one; can she thereby revive a cause of action that has expired under Alabama law? The Court's logic would so indicate. The life of her cause of action is then determined by the fortuitous circumstances that enable her to make service of process in a certain state or states." (345 U.S. at 522).

Two diametrically conflicting recent decisions illustrate the soundness of Mr. Justice Jackson's prediction. *Schreiber v. Allis Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), and *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987). Both cases were actions filed in federal district court in Mississippi, involving claims arising in other states. In both cases, the actions were transferred pursuant to 28 U.S.C. Sec. 1404(a) from Mississippi to the districts wherein the claims had arisen. In *Schreiber,*

the Tenth Circuit held that the Mississippi six year statute of limitations should be applied, since that was the forum state and Mississippi state courts would apply the six year statute to the out-of-state claim. The Section 1404 (a) transfer from Mississippi to Kansas could not change the rule. By this means, the claim arising in Kansas, and barred in Kansas by its two year limitations statute, regained life by being filed in Mississippi with its six year limitations statute, and then being transferred to Kansas.

But in *Ferens,* the Third Circuit disagreed, applying instead the limitations law of Pennsylvania where the claim arose, invoking the Due Process Clause and the Full Faith and Credit Clause.

Chief Judge Gibbons, in the 2-1 decision, essentially agreed with the strong academic criticism of *Schreiber* in more recent treatises and law review articles, i.e., E. Scoles & P. Hay, Conflict of Laws 132 (1984); Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L. J. 405, 421 (1980); Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L. J. 1, 56-65.

Judge Gibbons also relied on *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), which held that a Texas state court violated the due process clause by applying its own longer limitations period than that of the foreign nation (Mexico) where the claim arose.[4] Mr. Justice Brennan's succinct statement of a deeply rooted constitutional principle governing the states, in *Allstate Insurance Co. v.*

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4. Compare *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), discussed by Professor Martin in 61 Cornell L. Rev. at pp. 212-216. An Illinois contractual limitation shorter than Florida's limitations statute was disregarded when the insured property loss occurred in the forum state, Florida.

Hague, 449 U.S. 302, 310-11 (1981), reiterated by this Court in *Phillips,* was also relied upon by Chief Judge Gibbons:

> "[I]f a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." (819 F.2d at 427).

Professor Martin concludes flatly that *Schreiber* "is a violation of the full faith and credit clause of the Constitution. . ."; but that *Home Insurance Co. v. Dick,* "stands for the proposition that a state lacking contact with a case may not keep alive an action that is dead under the law that otherwise governs it." (19 Washburn L. J. at 415, 417).

It thus becomes self evident that a limitations statute is substantive in nature, insofar as it affects the real world. It is out-come determinative. A time limitation is far more than mere procedure, which more properly pertains to methods of commencing an action, or conducting it once commenced. Mr. Justice Jackson, in his *Wells* dissent, observed that the customary inclusion by state legislatures of limitations statutes in codes of civil procedure hardly justifies calling them "procedural" when they are plainly substantive in nature. If a claim is barred where it was created, it cannot rationally be given life by a forum state not interested in the claim itself.

Yet *Wells'* dictum continues to be relied on by lower courts, as in *Ridling v. Armstrong World,* 627 F.Supp. 1057, 1062 (S.D. Ala. 1986), which reached a result contrary to *Ferens v. Deere & Co.,* 819 F.2d 426 (3rd Cir. 1987).

Finally, the rationale of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985), itself points the way to the

correct constitutional solution. The Kansas Supreme Court mechanically distinguished the limitations issue from the liability and damage issues considered in *Phillips.* (A11). But the Seventh Circuit, in *Beard v. J. I. Case,* 823 F.2d 1095 (No. 86-1484, July 6, 1987), better understood the logical implications of *Phillips* in connection with the limitations issue, although it was not necessary in *Beard* to decide that issue. The court reasoned that the rationale of *Phillips Petroleum Co. v. Shutts* "may well apply to foreign laws governing the timeliness of an action, thereby calling into question the broad language in *Wells* and *Clay.* Nevertheless, we need not decide whether *Wells* and *Clay* have survived *Shutts.*" (Footnote 9).

That metaphysical arguments distinguishing between right and remedy sound so lawyerlike, though they are "patently silly", Professor Martin ascribes to historical repetition by outdated conflicts concepts. His conclusion that statutes of limitations have significant, probably dominant, substantive purpose in granting repose, seems undeniable. We have only to look at a few areas of law wherein the limitations issue looms ever larger as time goes on—products liability, involving vast differences among state limitation laws; commercial tort and contract cases of endless variety; and multi-state class actions, such as this case itself.

Reason and common sense dictate that without a remedy, there is no right. The presence or absence of a remedy effectively allows or denies the right asserted to exist. And if a state creates a legal right, allowing courts to enforce it only during a prescribed period of time, that legal right logically terminates when the time expires.

Nothing in the Full Faith and Credit Clause of our Constitution suggests that the public Acts of one State,

limiting the time for enforcing a claim arising under the laws of that State, are not to be enforced by another state. On the face of it, the Clause literally commands the contrary.

The aberration from that supreme command stems quite simply from an unthinking repetition of the old shibboleth utilized by the lower court, that what is "remedial or procedural" does not affect the substantive right; and that a limitations statute is merely remedial or procedural.

These Due Process and Full Faith and Credit issues bearing on the limitations statutes of the various States continue to arise with great frequency. The conflict among the courts, the confusion due to overbroad and unsound dictum in *Wells*, and the constitutional need to recognize limitations statutes as substantive, are uniformly recognized by scholars in recent articles and treatises.

This constitutional issue is ripe for resolution. Having recently decided in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require the forum state to apply the laws of the states where the claims arose, in a similar multi-state class action, it seems propitious and timely now to decide the present limitations issue left open by *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 (1984).

II. The Decision Below Contlicts With Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985).

In *Phillips*, this Court observed that Texas recognizes interest liability for suspended royalties, but

> ". . . Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. Tex. Const. Art. 16, Sec. 11; Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vernon 1971). See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); . . ." (472 U.S. at 817).

Since then, Texas has re-affirmed *Stahl* in *Mo.-Kan.-Tex.R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (Tex. Civ. App. 1986) (Error Refused, NRE, June 25, 1986). The latter case rejected as unsound several federal court decisions construing Texas law as allowing higher than 6% interest on "equitable" grounds. The 6% rate is to govern whether awarded on statutory or equitable grounds, except in a limited category of tort cases.

Yet the Kansas Supreme Court after remand by this Court in *Phillips*, found that *Stahl's* 6% rate was not applicable, since the Texas courts had not specifically considered and ruled upon the interest theory developed by the Kansas courts. (732 P.2d at 1298). It then found that Texas would apply the Kansas equity and contract theory imposing a much higher rate of interest. (732 P.2d at 1312). In short, Kansas says that a forum state may ignore the otherwise governing law of another state on an identical claim, if the forum state can conceive of reasons or theories not specifically stated and ruled upon by the other state in arriving at its rule of law. The forum state, presumably, is then free to conclude that the law of the other state is the same as that of the forum state, despite the difference in rates in identical circumstances.

The Kansas Court, in similar manner, disregarded the 6% rate established in Oklahoma and the 7% rate in Louisiana, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

The claims arising in these three states composed more than 90% of the liability arising under Sun's second, 1978, payout.[5]

Kansas, the forum State, has thus failed to apply the existing laws governing interest in Texas and other States wherein the claims arose, by predicting that these States would adopt the Kansas theory of interest. Given clear statutory law and judicial precedent, the forum state should not be permitted to evade that existing, governing law by determining that the forum state has developed legal theories which the other state would follow if and when presented to its courts. Otherwise, the constitutional limitations upon states having no connection with the claims in suit can easily and regularly be evaded, and rendered for naught by theories of what the law ought to be, rather than what it is.

This Court should not permit Kansas to circumvent, so transparently, the constitutional limitations upon its power, and this Court's *Phillips'* decision defining that power.

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5. Sun made two payouts of suspense royalties. The first was in July, 1976, more than three years before a suit was filed in August, 1976; while the second payout was in 1978. Over 90% of each payout involved claims arising in Texas, Oklahoma and Louisiana.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

- and -

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

Attorneys for Petitioner

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*Counsel of Record

APPENDIX

[Filed March 30, 1987]

No. 59,804

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Appellees,

v.

SUN OIL COMPANY,
Appellant.

SYLLABUS BY THE COURT

1.

In a multi-state class action suit for interest on suspended gas royalties, it is held prejudgment interest is appropriate and should be calculated for all members of the class at the interest rate Sun Oil Company agreed to pay its purchasers if its rate increase was not approved by the Federal Energy Regulatory Commission.

2.

In a multi-state class action suit for interest on suspended royalties, post-judgment interest shall be calculated at the statutory rate for each state where the royalties are produced.

3.

In order for a court of this state to exercise jurisdiction over a nonresident class action plaintiff, it must meet minimal due process requirements—among other

things, that a nonresident plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "exclusion request" form to the court.

4.

While ordinarily the costs of sending notice must be borne by the plaintiff class, under the circumstances of this case, the expense of sending additional notice was properly placed upon the defendant.

5.

Generally, limitation statutes are considered as being remedial or procedural in their application and do not affect the substantive rights of the litigants.

Appeal from Barber district court, CLARENCE E. RENNER, judge. Opinion filed March 30, 1987. Affirmed in part and reversed in part.

Gerald Sawaczky, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Jim H. Goering,* of the same firm, was with him on the briefs for appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action filed in August of 1979 on behalf of owners of mineral leaseholds seeking to recover suspended gas royalties from Sun Oil Company. This court affirmed the district court's judgment for the plaintiff class in *Wortman v. Sun Oil Co.,* 236 Kan. 266, 690 P.2d 385 (1984). The United States Supreme Court subsequently vacated and remanded this case in light of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2695 (1985) (*Phillips*).

While the facts in this case were set forth in some detail in our previous opinion, they will be summarized here for reference purposes.

During the 1960's and 1970's, Sun Oil Company applied to the Federal Power Commission (FPC) for gas price rate increases. While waiting for approval of such increases, Sun charged its purchasers the increased rates, but withheld the increased gas royalties from the owners of the mineral leaseholds.

In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases not ultimately approved together with interest at rates established by the Federal Energy Regulatory Commission (FERC) thereon. Sun then informed its royalty owners that payment of the increased price would be suspended until final approval of the rate increases.

In July of 1976, pursuant to FPC opinions 699 and 699H, Sun paid $1,167,000 in suspended royalties to owners of oil and gas leaseholds in six states: Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas. This payment was a result of price increases collected by Sun between July 1974 and April 1976.

In April of 1978, pursuant to FPC opinions 770 and 770A, Sun paid suspended royalties in the amount of $2,676,000 to royalty owners with property in the six states listed. This payment resulted from price increases collected by Sun between December 1976 and April 1978.

This suit was filed on August 30, 1979, to recover prejudgment interest on the suspended gas royalties and was subsequently certified as a class action. Notice of the action was sent to 3,159 class members. Of these, 105 members "opted out" of the class, although none of the members were supplied with a request for exclusion ("opt out") form.

The district court determined prejudgment interest was due from Sun to the royalty owners and applied an interest rate derived from Sun's corporate undertaking with the FPC. (Sun had agreed to an interest rate to be paid on accumulated amounts of unapproved price increases refunded to gas purchasers.) The district court also awarded post-judgment interest. This court affirmed the district court's judgment in *Wortman v. Sun Oil Co.*, 236 Kan. 266, as to prejudgment interest.

The United States Supreme Court vacated and remanded this case in light of *Phillips*, holding that application of Kansas contract and equity law to class actions involving gas leases predominantly in other states was sufficiently arbitrary and unfair as to exceed constitutional limits.

On remand, the district judge concluded as follows:

"I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I *come to the same result concerning FERC interest rates to be applied as before.* All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

"The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgment. After date of judgment, the Kansas judgment rate of 15% per annum simple interest applies." (Emphasis added.)

The district court also ruled that the Kansas five-year statute of limitations for actions on written instruments was applicable to the claims of both residents and nonresidents. Finally, the district court determined that "opt out" forms should be mailed to class members at the expense of the defendant within 15 days from the filing of the court's decision. Sun appeals from the district court's rulings.

The first issue on appeal is whether the district court improperly applied a prejudgment interest rate derived from Sun's corporate undertaking with the FPC. Sun argues that under *Phillips*, the statutory interest rate of each state in which gas leases are located must be applied.

This issue was recently addressed and resolved in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, ... P.2d ..... (1987) (*Shutts*). In *Shutts*, this court reviewed the law of six jurisdictions containing 97% of Phillips' nationwide leases (Texas, Oklahoma, New Mexico, Wyoming, Louisiana, and Kansas). The court concluded:

"Based upon the law of the five enumerated jurisdictions as above reviewed, and upon all of the facts, conditions, and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust enrichment to hold Phillips liable

for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. § 154.102 (1986) to the time of judgment herein. *These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion.*" (Emphasis added.) 240 Kan. at .....

Shutts is controlling here and requires us to find the district court applied the proper prejudgment interest rate to the suspended royalties.

Also, pursuant to *Shutts*, we hold that the applicable interest after the date of the judgment, July 14, 1986, shall be the statutory rate for each state where the gas royalty is produced.

In Kansas, K.S.A. 1986 Supp. 16-204(c) sets the rate for post-judgment interest. The statutory interest rates on judgments in all states involved in this action, other than Kansas, are: Texas—18% (Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 [Vernon 1987]); Oklahoma 15% (Okla. Stat. tit. 12 § 727 [1985]); Louisiana—7% (La. Civ. Code Ann. art. 2924 [West 1987 Supp.]); New Mexico—15% (N.M. Stat. Ann. 56-8-4 [1986]); Mississippi—8% (Miss. Code Ann. § 75-17-7 [1986 Supp.]).

The appellant next alleges the district court erred in failing to require that class members receive exclusion request forms prior to entry of judgment and in ordering the appellant to pay the costs of notice.

With respect to this issue, the district court held:

"Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class, is hereto attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order."

In order for the district court to properly assert personal jurisdiction over class members whose residences and leases are not in the State of Kansas, minimal due process requirements must be satisfied. These requirements were recently set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-12:

> "If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citations omitted.] The notice should de-

scribe the action and the plaintiffs' rights in it. *Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.* Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." (Emphasis added.)

Since opt out forms were never sent to class members with the notice in this case, the district court properly determined such forms must be sent in order to meet minimal due process requirements. The appellant argues, however, that the court erred in not requiring that opt out forms be sent prior to entry of judgment and at the expense of plaintiffs rather than defendants.

Notice to class members must be sent long before the merits of the case are adjudicated. 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1788 (1986). Here, while notice was sent to class members when the class was certified, it did not contain an opt out form.

Appellant cites no authority for its contention that the district court erred by not requiring opt out forms be sent prior to entry of judgment. Here, the district court had previously ruled in favor of the class and this court affirmed. While the case was ultimately remanded to the district court, members of the class were aware judgment had previously been entered for the class and the primary remaining question was what interest rate would be applied. Under such circumstances, it was proper for the district court to require that opt out forms be sent within 15 days of entry of judgment.

This leaves the issue of whether the responsibility for sending additional notice and opt out forms was properly placed with the appellant. The district court ruled that Sun was responsible for mailing notice with the exclusion request form attached to all members of the plaintiff class. The court further held that such mailing could be included in the next regular monthly royalty payment disbursed by the defendant, but in no event later than 15 days from the filing of the order.

The case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), is relevant to our analysis of this issue. In *Eisen*, a federal district court held a preliminary hearing to determine how to allocate the costs of notice to the class. At the hearing, it was determined that the plaintiff class was likely to prevail on its claim and the defendants were thus ordered to pay 90% of the costs of the action.

In reversing the district court, the Supreme Court ruled that a preliminary procedure, such as that utilized by the district court in *Eisen*, is improper as it "may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials." 417 U.S. at 178. The court further ruled that a plaintiff must bear the initial notice costs as part of the "ordinary burden of financing his own suit." 417 U.S. at 179.

Since *Eisen*, lower courts have consistently held that notice costs must be borne by the plaintiff class. 7B Wright, Miller & Kane, Federal Practice and Procedure § 1788, p. 233. However, the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978), left the possibility open

that in some cases, the cost of notice could be placed on the defendant. The court ruled:

> "In those cases where a district court properly decides under Rule 23(d) that a defendant rather than the representative plaintiff should perform a task necessary to send the class notice, the question that then will arise is which party should bear the expense. On one hand, it may be argued that this should be borne by the defendant because a party ordinarily must bear the expense of complying with orders properly issued by the district court; but *Eisen IV* strongly suggests that the representative plaintiff should bear this expense because it is he who seeks to maintain this suit as a class action. In this situation, the district court must exercise its discretion in deciding whether to leave the cost of complying with its order where it falls, on the defendant, or place it on the party that benefits, the representative plaintiff."

In the instant case, the merits of the case had already been determined against the defendant, Sun. Thus, we hold under the circumstances of this case the costs of financing the additional notice were properly placed upon the defendant.

Sun next contends the district court erred in applying the Kansas five-year statute of limitations to the claims of nonresident class members insofar as those claims arose out of the 1976 payment of suspense royalties. Sun argues the United States Supreme Court's holding in *Phillips* requires this court to apply the statutes of limitations of each of the states in which the claim arose.

First, it should be noted that, in *Phillips*, the Supreme Court was concerned with the *substantive* conflict between Kansas law and the laws of the states in which the gas leaseholds were located. That substantive conflict related to the interest to be applied to royalty payments—an issue already resolved by this court.

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations and the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

[Filed June 8, 1987]

IN THE
SUPREME COURT OF THE STATE OF KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,	)	No. 86-59804-AS
Appellees,	)	
v.	)	
SUN OIL COMPANY,	)	
Appellant.	)	

ORDER

Sun Oil Company's motion for rehearing is denied.

The opinion filed March 30, 1987, is modified starting with the next to the last paragraph on page 232 of the advance sheet (241 Kan.) to read as follows:

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations.

Sun Oil further argues that K.S.A. 60-516 requires the application of the statutes of limitation of the states in which the individual royalty owners reside. That statute provides that when a cause of action has arisen in another state and by the laws of that state a cause of action cannot be maintained because of lapse of time, no action can be maintained thereon in this state. We hold K.S.A. 60-516 is inapplicable here because it applies only where the cause of action has arisen in another state. Here, the cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi.

We conclude the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

BY ORDER OF THE COURT this 8th day of June 1987.

/s/ Harold S. Herd
Harold S. Herd, Justice
For the Court

[Filed July 14, 1986]

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
-vs-	)	Case No. 79C40
	)	
SUN OIL COMPANY,	)	
	)	
Defendants.	)	

MEMORANDUM DECISION

Pursuant to Order of Remand issued by the Kansas Supreme Court on January 6, 1986, this case was briefed by the parties and was orally argued before the Court on April 29, 1986. The case had been remanded by the United States Supreme Court to the Kansas Supreme Court and then to this Court as the original Trial Court. Jurisdiction over the class as ordered by this Court has been affirmed. The remaining issues are liability of the defendant, if any, for interest on suspended royalty payments, according to laws of the various states involved and the rate of interest.

The facts of this case are as stated in the original Findings of Fact of this Court and its Memorandum Decision of December 12, 1983, pages 1-6, which are made a part hereof and will not be repeated here, plus the following supplemental finding as to interest rates from March, 1982, to date of judgement in December, 1983:

April to June '82 (March, Apr, May)	16.50%
July to September '82 (June, July, August)	15.72%
Octcher to December '82 (Sept., Oct., Nov.)	12.62%
January to March '83 (Dec. '82, Jan. & Feb. '83)	11.21%
April to June '83 (March, April, May)	10.50%
July to September '83 (June, July, August)	10.63%
October to December '83 (Sept., Oct., Nov.)	11.00%

(Above compounded quarterly. 18CFR 154.67)

CONCLUSIONS OF LAW

The Court has again carefully examined the case law and statutory law of Texas, Oklahoma, Louisiana, New Mexico and Mississippi and compared the laws of each state to the general contract interest law and equitable or moratory interest law as applied by the Kansas Court in *Shutts I* and *Shutts II;* and in this case, I find that all of those states allow a higher interest rate if there is a contract or specific agreement calling for a higher rate of interest, or in situations where equity would require a higher rate; that the equitable or moratory rate is the FERC rate, not the statutory rate; and that there is no conflict with the allowance by the Kansas Court of a contract rate or an equitable agreed rate of interest, the FERC rate, herein to royalty owners resident in other states named above.

Although plaintiffs' remedy, the recovery of interest, sounds in equity, the nature of the action is the enforcement of a written agreement which is governed in Kansas by K.S.A. 60-511 and governed in the other states named above by similar statutes concerning payment of interest

under written agreements. The Petition states (pages 2 and 3) that plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on any one or more of the following theories or for the following reasons:

a. The doctrine of unjust enrichment (*Shutts I*);

b. The equitable principle of paying interest on actual use of money belonging to another (*Shutts I*, Syllabus 20);

c. Equitable principles that class members receive the same treatment as gas purchasers as to interest required by FPC (*Shutts I*, Syllabus 21 and 22);

d. Sun made an express agreement by filing corporate undertaking with FPC to pay interest on the "suspended proceeds" (*Shutts I*, Page 564).

Legal proceedings are what they are in essence and not what they may be named. (*Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617.) If facts set forth in a petition entitle a party to relief, it is immaterial by what name the action is called. The Court must ascertain the true scope and nature of the action. (1 Am Jur. 2d, *Actions*, Subsection 5, Pages 545-546.) This case has an unjust enrichment feature, a basis in equity. It also has a contract feature, a basis in contract, both the oil and gas leases and the undertaking filed with FPC. Although plaintiffs' remedy may be of an equitable nature, for damages, the basis of the action arises from and grows out of written agreements. If the action is one for damages, that in and of itself does not convert it to something other than an action growing out of written contracts. (See *Baker v. Skinner*, 63 Kan. 83, 64 Pac. 981; and *Thompson v. Phillips Pipeline Co.*, 200 Kan. 669, 438 P.2d, 146.)

As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1392 (1977), cert. denied 434 U.S. 961. The only factual distinctions are the numbers involved and that FPC began making its rates nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produces natural gas.

The Court adopts the choice of law discussion set forth by the Kansas Supreme Court in *Shutts I*. I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I come to the same result concerning FERC interest rates to be applied as before. All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgement. After date of judgement, the Kansas judgement rate of 15% per annum simple interest applies.

The only states where the liability issue of interest on FPC suspense royalties has been presented directly are

Kansas, Texas and Louisiana. Leading cases on the liability issue are as follows:

Kansas: *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 434 U.S. 1068; and *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d .....;

Texas: *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480;

Louisiana: *Boutte v. Chevron Oil Co.*, 315 F. Supp. 524.

In this case there is one key fact: for several years Sun used money owed to royalty owners all the while knowing it never owned the money. While Sun collected 8/8ths of the increased rates, the 1/8th royalty share could never belong to Sun. That royalty share, according to eventual FERC ruling and Court approval, was either to go to royalty owners, or back to gas purchasers, with interest, or part to one and part to the other. This is true regardless of whether the increased rates were ultimately approved, disapproved or approved in part and disapproved in part. Finally the rate increases were approved, the approval conclusively determining that from the date of receipt of the increased rates the gas was worth the increased amount. Thereafter, the suspense royalties were paid to the gas royalty owners, but without interest and without any suggestion that interest was due.

There is nothing in the interest statutes of the other five states involved that would not allow the Kansas Court to grant contract rate interest or equitable or moatory interest in this case. There is nothing in the interest statutes of other states involved that would not allow the granting of FERC interest where Sun has agreed to pay FERC interest to purchasers in the event of refund of the

same money. Any alleged conflict overlooks the essential basis for the suit, seeking interest as required by contract and equity. No authority has been found demonstrating Texas or Oklahoma or any other state involved takes a narrower view of that requirement.

By accepting the rate increases on the condition of having to repay purchases with interest at FERC rates, even remotely prudent practices dictates that Sun invested the money so as to yield at least 9% which was the FERC rate during all the periods of suspension herein and until payout. Thereafter, and in August, 1979, this suit was filed, and after September, 1979, and the increase in FERC rates from 9% simple interest to the bank prime rate, compounded quarterly, Sun deliberately chose to contest paying interest rather than to pay and avoid much higher FERC rates that came later.

Many Kansas Supreme Court opinions on FPC suspense royalty interest were handed down in the period 1974 to 1978 when Sun was accumulating and using these FPC suspense royalties:

a. *Shutts I* supra;

b. *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080;

c. *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S.CT. 1242;

d. *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634;

e. *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 cert. denied 98 S.CT. 1246;

f. *Nix v. Northern Natural Gas Producing Co. and Mobil.*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S.CT. 1246; and

g. *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

These cases clearly hold Kansas committed to FERC rates on interest to be allowed.

TEXAS

Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co., 456 F.2d 203 (1972), was a federal case dealing with Texas law. Richardson had a contract with Phillips pertaining to price to be paid by Phillips to Richardson for residue gas. The contract provided for a price "equal to the price . . . which Phillips receives . . . for gas sold to El Paso Natural Gas Company. . ." The contract further provided that in the event Federal Power Commission orders required Phillips to refund to El Paso, the price to Richardson also would be adjusted. The contract said nothing about interest, but the case definitely states at Page 201:

"Phillips made refunds to El Paso under Federal Power Commissioon orders together with interest. . ."

The Court further held:

"Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, it became a part of the whole. Interest was due on so much of the whole as remained unpaid after January 31, 1969."

Texas is a state that has a number of cases, both state and federal, dealing with the subject of interest on FPC suspense royalties. In all of them, interest has been allowed, at the statutory interest rate of 6% excepting for the *Sid Richardson* case. They include: *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (1975); *First National Bank of Borger v. Phillips*, 513 F.2d 371 (1975); *Phillips Petroleum Co. v. Riverview*, 513 F.2d 374 (1975); *Fuller v. Phillips*, 408 F. Supp. 643 (1976); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193 (1976); *Phillips Petroleum Co. v. Hazelwood*, 534 F.2d 61 (1976); *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (1977); and *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978).

The last *Stahl* case was the one where the equitable principles were used in addition to other theories, but the statutory interest rate was applied rather than FERC contract rate because no one had asked for the FERC contract rate.

OKLAHOMA LAW

There are numerous decisions in various jurisdictions fixing an equitable rate of interest different than the statutory rate, such as the Colorado Federal Court case of *Davis Cattle Co., Inc. v. Great Western Sugar Co.*, 303 F. Supp. 1165, cited by plaintiffs. Equitable or moratory interest is distinguished by every state in the nation from statutory interest. It is an underlying facet of American law and demonstrates that the law is fair and just. Sun does not argue that it would be either equitable, fair or just for it to pay only 6% interest when the going rate was twice that or more. Oklahoma follows this doctrine of unjust enrichment, *Monarch Re-*

fineries v. Union Tank Car Co., 141 P.2d 566 and *Welling v. American Roofing*, 617 P.2d 206.

Roberson Steel Co. v. Harrell, 177 F.2d 12 (Oklahoma, 10th Circuit 1949) was a case involving Oklahoma law. It was said at Page 17:

> "It is the general rule of law in Oklahoma that interest on an unliquidated account or claim is not recoverable until the amount due is fixed by judgement. *Dick v. Essary*, Oklahoma Supp. 203 P.2d 715; *Grand River Dam Authority v. Jarvis*, (10th Circuit) 124 F.2d 914; *Saulsbury Oil Co. v. Phillips Petroleum Co.*, (10th Circuit) 142 F.2d 27, certiorari denied 323 U.S. 727, 65 S.CT. 62, 89 L. Ed. 584. But compensation is a fundamental principle of damages, whether the action be in contract or tort; and one who fails to perform his contract is justly bound to make good all damages which naturally and reasonably accrue from breach. And while generally interest is not allowed upon unliquidated damages prior to the entry of judgement, the court may in the exercise of a sound discretion include interest or its equivalent as an element of damages when it is necessary in order to arrive at fair compensation. *Miller v. Robertson*, 266 U.S. 243, 45 S.CT. 73, 69 L. Ed. 265; *Concordia Insurance Co. v. School District No. 98*, 282 U.S. 545, 51 S.CT. 275, 75 L. Ed. 528."

Our Kansas Supreme Court in *Shutts I* said at Page 562:

> "Oklahoma has no decision allowing interest on 'suspense royalties.' However, several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith v. Owens*, 397 P.2d 673 (Oklahoma 1963);
>
> and
>
> *First National Bank & T. Co. v. Exchange National Bank & T. Co.*

New Mexico undoubtedly would allow the contract - FERC rate. It does have an equitable or moratory interest case, *Chromo Mountain Range Partnership v. Gonzales*, 681 P.2d 724 (1984), which includes the allowance of moratory interest in connection with a land sale contract. (See also *Robb v. Universal Constructors, Inc.*, 665 F.2d 998, 1002.)

The statute quoted by Sun applies "in the absence of a written contract fixing a different rate. . ." In this case, we do have a written contract fixing a different rate, the undertaking filed by Sun with FERC.

MISSISSIPPI

Sun quotes no case in Mississippi that would prevent the Mississippi courts from allowing the FERC contract rate as was done in this case and in *Shutts II*. Mississippi, therefore, undoubtedly would allow the contract rate and the equitable rate allowed in this case.

Statutes of limitation questions raised by Sun at this time are a non issue - a dead issue; but this action is not barred by statutes of limitation either in Kansas or in the other states involved. In addition to the "US Rule" which makes the five year statute pertaining to royalties apply, the agreed or contract rate published by FERC also applies, and the expressed contract statute of limitations applies in all states. The Kansas Supreme Court held in this case that the five year statute, not the three year

statute as alleged by Sun, applied. The five year statute applies to written instruments. There were two written instruments, express agreements or contracts which have relation to this case. (1) the oil and gas leases; and (2) the corporate undertaking filed by Sun with FERC to pay both principal and interest on this same money. Sun continued to argue statutes of limitation in its Petition for Certiorari. The U.S. Supreme Court granted certiorari and remanded the case for reconsideration, but only "in the light of *Shutts II*". *Shutts II* says nothing whatsoever about statutes of limitation. The Kansas Supreme Court remanded to this court to reconsider also "in the light of *Shutts II*". The matter is no longer debatable. Laws pertaining to collection of interest in the other states involved on written obligations are applicable and include all interest sought by plaintiffs to be recovered from a date five years back or more from the date of filing their Petition. Interest is allowed on all amounts collected and used by Sun to a date beginning five years back of the filing of the Petition in this case.

Kansas, through *Shutts I and II*, have developed common law principles applicable to the facts of this case. I find no disregard for the laws of other states nor unfair application of Kansas law to the litigants has occurred. Sun has no constitutional right to avoid judgement in Kansas because it might have convinced a Court in another state to develop its law differently. I find that no unambiguous conflict has occurred in the rulings of *Shutts II* as compared to the established laws of the five other states involved.

Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class, is hereto

attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order.

The Court specifically finds that allowance of only 6% per annum statutory rate in times when bank prime rates rose as high as 10% to 20% was neither equitable nor proper.

Sun should pay the costs of this action, including costs of mailing the first notice on the class order by plaintiffs and the second notice as attached hereto.

Sun is hereby ordered, within 30 days of the date of this order, to account to the plaintiff class for the total amount of money owed pursuant to the interest rates herein applied; and, in the event of appeal, Sun should post bond according to statue.

Defendants' motion to decertify the class is overruled.

These findings and conclusions when filed shall act as a Journal Entry.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

Original - file

Copies - W. Luke Chapin
Ed Moore
Gerald Sawatzky
William C. Phelps

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL WORTMAN, Individually and as representatives of certain others,

Plaintiffs,

-vs- Case No. 79C40

SUN OIL COMPANY, a Delaware Corporation,

Defendant.

NOTICE OF CLASS ACTION SUIT AND JUDGEMENT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 700A.

In 1983, you received notice that you are a member of plaintiff class in this suit against Sun for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by Sun subsequent to August 23, 1974. There were about 3,000 gas royalty owners who received suspense payments in excess of $3,000,000.00.

Case was tried in the District Court of Barber County, Kansas, and interest allowed according to Federal Power

Commission interest rates; on appeal the Kansas Supreme Court affirmed; on Petition for Certiorari to the U.S. Supreme Court, it remanded to Kansas with instructions to consider further laws of other states involved, including interest rates, "in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. ..... (1985), 86 L. Ed 2d 628, 105 S.Ct. 2965."

This trial court has again considered the matter and allowed interest to you and other members of plaintiff class. your share is proportionate to the amount of suspense royalties you received.

You will be included as a member of plaintiff class and receive interest check from Sun in due time, subject to further possible appeal by Sun; provided, however, you may elect to be excluded from the class and from receiving interest check by sneding [sic] a request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

> Clerk of the District Court, Barber County Courthouse, Medicine Lodge, Kansas 67104.

This request must be mailed so as to be received on or before August 15, 1986. The court has determined that all requests for exclusion received on or before that date will be granted without further hearing. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will continue to represent him as a member of the plaintiff class.

Judgement in this action, whether for the plaintiff class or the defendant, will be binding upon all class members except those who may be excluded as above stated. Class members excluded will not be entitled to

share in the benefit of any judgement or settlement entered or concluded favorable to plaintiff class, nor will excluded class members be held bound in this action if judgement eventually is rendered for Sun.

Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd of the interest fund created. This means that if the interest judgement entered in your favor is affirmed on appeal and not reversed, the court may award up to 1/3rd of it to be paid to plaintiffs' attorneys to compensate them for representing your interests. If you elect to intervene with your own attorneys, your share of a favorable judgement will not be reduced, excepting for the work done by plaintiffs' attorneys up to date. If you request exclusion from the class, you will not be assessed any attorneys' fees or costs; neither will you receive any share of interest which may be allowed. If Sun should eventually win and no interest is allowed to your class, no attorneys' fees or costs can be assessed to you. if you want further information, please do not call the Judge of [sic] Clerk of the court, but call or write to one of the attorneys listed below.

If you want to remain eligible for interest check, do nothing.

If you want to exclude yourself from plaintiff class and possibility of receiving interest check, send in request below.

DATED JULY, 1986.

.....

Clarence E. Renner
District Judge

Attorneys for Plaintiffs:

W. Luke Chapin
Chapin & Penny
P. O. Box 148
Medicine Lodge, KS. 67104
(316) 886-5611

Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, OK 73728
(405) 596-3383

Attorneys for Defendant:

Gerald Sawatzky
Foulston, Siefkin, Powers
& Eberhardt
700 Fourth Financial Center
Wichita, KS. 67202
(316) 267-6371

William C. Phelps
Sun Gas Company
Three North Park East
Dallas, TX 75221

..... (Cut Here) .....

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE,)
Individually and as representatives)
of certain others,)
)
Plaintiffs,)
)
-vs- Case No. 79C40)
)
SUN OIL COMPANY,)
)
Defendant.)

REQUEST FOR EXCLUSION

TO THE CLERK OF THE DISTRICT COURT OF BARBER COUNTY, KANSAS, MEDICINE LODGE, KANSAS 67401:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of this notice of class action and judgement dated July, 1986.

DATED ....., 1986.

Send to:

Clerk of the
District Court
Barber County
Courthouse
Medicine Lodge,
KS 67104

Signature: .....
Print Name: .....
Address: .....
.....
.....
Sun Owner No. .....

PETITIONER'S STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Sun Oil Company's name has been changed to Sun Exploration and Production Company, the parent company of which is Sun Company, Inc. The assets of Sun Exploration and Production Company have been transferred to Sun Energy Partners, L.P., of which Sun Exploration and Production Company is the managing general partner. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc., East Texas Salt Water Disposal Company, and Van Salt Water Disposal Company. The non-wholly owned subsidiaries of Sun Company, Inc., are Suncor, Inc., and Sunolin Chemical Company.

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payments of suspended proceeds or royalties pursuant to FPC Opinions or FERC,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

W. LUKE CHAPIN
Counsel of Record
GORDON PENNY
CHAPIN & PENNY
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

STEPHEN JONES
JONES & JENNINGS
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

Sun's brief pertains mostly to statute of limitations. This is not an issue. The case was reversed and remanded "in the light of *Shutts II*." *Shutts II* contains nothing whatsoever about statute of limitations. Sun relies on a dissenting opinion in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), 73 S. Ct. 856. Sun wants this court to grant certiorari and overrule the majority holding in *Wells* which has been good law for many years.

1. Is statute of limitations an issue in this case?

2. If it is, is Sun entitled to certiorari for this court to re-examine the *Wells* case, whether it should overrule it, make Sun's requests on statute of limitations a constitutional matter in this case and overrule the Supreme Court of Kansas on the statute of limitation matter?

3. Sun agrees that interest is due the royalty owners. Sun asserts that interest should be paid at rates set by statutes in the other states.

The Kansas Supreme Court has examined the laws of the states involved and has found that each of these states would allow interest at the FERC rates if the Courts of each case had the issue squarely presented. The Kansas Supreme Court found that under the unique facts of this case, that the other states would allow interest at FERC rates, rather than at the general rate set by statute where there is no agreement as to interest. The question to be decided on Sun's Petition is whether this Court should review the Kansas Court's determination of the laws of the other states.

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No. 87-352

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This case was heard by a different Trial Court than *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797. When reversed and remanded by this Court "in the light of *Shutts,*" it was remanded by the Kansas Supreme Court to the Trial Court, Honorable Clarence E. Renner, Trial Judge. Judge Renner heard the case again, and after suggested findings of fact and conclusions of law by both sides, made his Memorandum Decision filed July 14, 1986, and appearing at Appendix to Petition for Certiorari, A14 et seq. Sun appealed to the Kansas Supreme Court. Both sides filed briefs. The case was argued to the entire court and opinion was filed March 30, 1987. Sun filed Motion for Rehearing as to the statute of limitations question. After opinion was filed on the motion, Sun has filed Petition for Certiorari.

NATURE OF THE CASE

This is an action in equity by a class consisting of Sun's gas royalty owners against Sun to collect interest or damages for the use by Sun of the royalty owners' money. Instead of paying out the royalty share of the higher prices, Sun instead notified its royalty owners that it was suspending the increased royalties pending approval by the courts of the gas rate increases allowed by FERC (Federal Energy Resources Commission, formerly Federal Power Commission). Sun did not actually suspend the increased royalty money by placing it in a suspense account which would draw interest, but instead, placed the money in its general cash account, just as any other income it may have received and used it to make profit for Sun and its shareholders.

This is a reversal and remand by the U. S. Supreme Court to re-examine the interest laws of other states where Sun has the oil and gas leases giving rise to the royalties "suspended" and used by Sun. Almost identical facts, excepting for numbers and territory involved was before the Kansas Supreme Court in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). The present case of *Shutts, et al. v. Phillips Petroleum Co.*, 240 Kan. 764 (1986), is before this Court now on Petition for Cert., *Phillips Petroleum Co. v. Shutts, et al.*, No. 87-384.

STATEMENT OF THE CASE

On remand from the U. S. Supreme Court, the Kansas Supreme Court first sent the case back to the Trial Court for re-examination "in the light of the U. S. Supreme Court

Opinion in the *Shutts* case." (472 U.S. 797—1985.) The Trial Court re-examined interest laws of other states and came to the same conclusion as before regarding interest allowable in other states and the interest rate.

The Kansas Supreme Court affirmed the Trial Court again, saying, "*Shutts* (240 Kan. 764—1986) is controlling here and requires us to find the District Court applied the proper prejudgment interest rate to the suspended royalties."

In *Shutts, Executor, et al. v. Phillips*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978), an area consisting of all of the State of Kansas and parts of the States of Texas and Oklahoma was involved. This was one of seven pricing areas of the FPC at the time. Later, with Opinion 699, involved in this case, the FERC (formerly FPC) abandoned area-wide pricing and began nation-wide pricing because natural gas was bought, distributed and sold nation-wide, not just area-wide. Pricing being nation-wide, Sun changed its accounting system and the class affected by Sun's actions became nation-wide rather than area-wide.

Kansas in a number of cases and all other states that have examined the question of equity in requiring gas producers to pay interest on their royalty owners' money held and used rather than being paid out, have required the gas producers to pay interest to their royalty owners.[1]

Sun raises no defense to the general and universal proposition in equity that where one uses another's money to make a profit for himself, he must pay for its use.

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1. *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527; *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Texas); *Boutte v. Chevron Oil Company*, 316 F. Supp. 524.

Rather, Sun raises defenses based on statutes of limitation and claims that other states have different interest rates that should apply.

Plaintiff class consists of the landowners, those who originally owned the oil, gas and other minerals in and under the land, and also certain assignees of interest in the oil, gas and other minerals. They have leased for exploration, development and production of oil and gas to Sun or to brokers who have assigned to Sun, and Sun, under the terms of the oil and gas leases, customarily pays out 1/8th of the proceeds of sale of gas produced to those royalty owners monthly. The other 7/8ths of the gas produced ordinarily is retained by the lessees, such as Sun.

In order to obtain a price increase for gas sold by Sun to the gas producers, certain rate schedules had to be filed with the FERC, setting forth the increase, and FERC approval of the increase was necessary under federal regulations. In Opinions 699, 749 and 770, FERC did approve certain rate increases. Sun collected the rate increases. Sun has had the free use of 7/8ths of the gas and the rate increases thereon, without interest. This suit involves interest only on the 1/8th share of the oil and gas rate increases held by Sun and used by Sun rather than being paid to the royalty owners.

Total judgment in this case, at FERC rates, is estimated to be $800 000.00. Total interest under the rate schedules involved in this case in August, 1979, when the case was filed, is estimated to be only about $300,000.00. The increase to $800,000.00 is accounted for by Sun's continued contest of the case rather than paying the interest due when the case was filed. Payment of $1.00

interest to its royalty owners in 1979 would have prevented the payment now of approximately $2.50.

The following are the essential facts as quoted from Kansas Supreme Court Opinion, Appendix to Petition, Page A3:

> "While the facts in this case were set forth in some detail in our previous opinion, they will be summarized here for reference purposes.
>
> "During the 1960's and 1970's, Sun Oil Company applied to the Federal Power Commission (FPC) for gas price rate increases. While waiting for approval of such increases, Sun charged its purchasers the increased rates, but withheld the increased gas royalties from the owners of the mineral leaseholds.
>
> "In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases not ultimately approved together with interest at rates established by the Federal Energy Regulatory Commission (FERC) thereon. Sun then informed its royalty owners that payment of the increased price would be suspended until final approval of the rate increases.
>
> "In July of 1976, pursuant to FPC Opinions 699 and 699H, Sun paid $1,167,000.00 in suspended royalties to owners of oil and gas leaseholds in six states. Texas, Oklahoma, Louisiana, New Mexico. Mississippi and Kansas. This payment was a result of price increases collected by Sun between July. 1974 and April, 1976.

"In April of 1978, pursuant to FPC Opinions 770 and 770A, Sun paid suspended royalties in the amount of $2,676,000.00 to royalty owners with property in the six states listed. This payment resulted from price increases collected by Sun between December, 1976 and April, 1978.

"This suit was filed on August 30, 1978, to recover prejudgment interest on the suspended gas royalties and were subsequently certified as a class action. Notice of the action was sent to 3,159 class members. Of these, 105 members 'opted out' of the class, although none of the members were supplied with a request for exclusion ('opt out') form.

"The District Court determined prejudgment interest was due from Sun to the royalty owners and applied an interest rate derived from Sun's corporate undertaking with the FPC. (Sun had agreed to interest rate to be paid on accumulated amounts of unapproved price increases refunded to gas purchasers.) . . ."

SUMMARY OF ARGUMENT

1. Statute of limitations is not really an issue. The case was remanded by this Court for further consideration in the light of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). There is nothing in *Shutts* about statutes of limitations and never has been. Sun keeps trying to bring up the issue, even though it is a dead issue.

2. Even if statute of limitations were an issue, no constitutional question is raised in this case involving

limitations. Limitations issues ordinarily are procedural and are governed by the law of the forum.

3. The equity rate—FERC rate—should apply. Statutory rates apply only where no contract exists governing interest rates on the same money. That is not true in this case. The FERC rate has become a part of the money due with the suspense royalties. (*Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co.*, 456 F.2d 203 (1972).)

4. There is no authority in any of the states involved which is contrary to the determinations of state law made by the Kansas Supreme Court. Federal Courts in Louisiana and Texas have said that when the suspended monies were finally paid, that interest would be due the royalty owners at FERC rates. Some Texas Courts have awarded interest at the statutory rate of 6%, but the Texas State Courts have never ruled on a claim for FERC rates vs. the statutory rate.

ARGUMENT

I. Statute of Limitations Is Not Really an Issue

When Sun filed Petition for Certiorari in this case before, it argued statute of limitations questions. This Court granted certiorari with a short opinion saying that the case was being reversed and remanded "in the light of *Shutts*." There is nothing about statute of limitations in *Shutts* and never has been. If statute of limitations is an issue, it never was raised by Philips in *Shutts*, and this Court said nothing about statute of limitations in reversing and remanding.

But Sun continues to argue statute of limitations as though this Court reversed and remanded on that ground. The Kansas Supreme Court affirmed the Trial Court's opinion in this case, and did address the statute of limitations question. It said:

> "First, it should be noted that, in Phillips, the Supreme Court was concerned with the substantive conflict between Kansas law and the laws of the states in which the gas leaseholds were located. That substantive conflict related to the interest to be applied to royalty payments—an issue already resolved by this court.
>
> "Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. (51 Am Jur 2d, *Limitation of Actions*, Section 21, Page 605.) Accordingly, we hold that Phillips does not require application of the various state's statutes of limitations and the District Court did not err in applying the Kansas five year statute of limitations to the claims of nonresident class members." (Petition A11.)

Sun filed a Motion for Rehearing strenuously arguing the statute of limitations question. Order of the Kansas Supreme Court was filed June 8, 1987, denying the Motion for Rehearing and stating that the Kansas Borrowing statute, K.S.A. 60-516 is inapplicable in this case because it applies only where the cause of action has arisen in another state and here, the causes of action arose in Kansas and other states.

Sun's argument on statute of limitations is not something that should be before this Court and is no reason to grant certiorari.

II. Statute of Limitations Not a Constitutional Question

Sun relies on *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). It is not analogous to this case. In *Home*, a Mexican insurance contract was sued on in Texas, where there was a two year statute of limitations. The Court held that the action was limited to one year, not by Mexican law, but by the terms of the insurance contract itself. It is further said in *Home*, at 281 U.S. 409:

> "And, in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred. In such cases, the rights and obligations of the parties are not varied."

In *Wells*, supra, this Court said:

> "Long ago, we held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit. (*McElmoyle v. Cohen*, 1839, 13 Pet. 312, 10 L.Ed. 127; *Townsend v. Jemison*, 1850, 9 How 407, 13 L.Ed. 194; *Bacon v. Howard*, 1857, 20 How 22, 15 L.Ed. 811. . .
>
> "The rule that the limitations of the forum apply (which this court has said meets the requirements of full faith and credit) is the usual conflicts rule of the states."

In *Keeton v. Hustler*, 465 U.S. 770 (1984), this Court said:

> "Under traditional choice of law principles the law of the forum state governs on matters of procedure." (Footnote No. 10.)

In Volume 51 Am Jur 2d, *Limitation of Actions*, Section 21, it is stated:

> "Generally speaking, statutes of limitation which are not a part of the right of action are procedural only, while conditions as to time which are contained in a statute which creates a right are a part of the substantive law creating the right of action. A true limitation statute is ordinarily considered as being remedial or procedural in its application, in no manner affecting the substantive rights of the litigants."

. . .

In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 it is said:

> "Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a 'right' a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.
>
> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizens from

> being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers v. Railway Exp. Agency*, 321 U.S. 342, 349, 88 L.Ed. 788, 792, 64 S. Ct. 582. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.
>
> "This Court, in *Campbell v. Holt*, adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitations go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value."

See also, *Townsend v. Jemison*, 9 How 407:

> "The rule in the courts of the United States in respect to pleas of the statutes of limitations has always been, that they strictly affect the remedy, and not the merits."

If this case had been brought in one of the other states, the limitation law applying would probably be of no benefit to Sun. All the states recognize longer limitations periods for actions on written contracts. At the base of the claims here are the written oil and gas leases.

Under settled law, Kansas (and each other state) has the right to prescribe its own public policy about the privilege to litigate and to set its own period of limitation. There is no need to reclassify limitations periods as "substantive" rather than "procedural." Such reclassification would upset an ancient and workable concept to no good purpose.

III. Equity Rate—FERC Rate—Should Apply

The FERC rate has been held many times to be an equitable interest rate to prevent unjust enrichment to gas producers.[2]

The Kansas Court applied the FPC rate in six similar class action cases in Kansas, and it was paid by the gas producers.[3]

---

2. *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 15 L.Ed. 284, 86 S. Ct. 360, Syl. 9; *Terrace, Inc. v. Federal Power Commission*, 290 F.2d 149 (1961); *Mississippi River Fuel Corp. v. FPC*, 281 F.2d 919 (1960); *Brooklyn Union Gas Co. v. Transcontinental Gas P. L. Corp.*, 201 F. Supp. 679 (1960); *Continental Oil Co. v. FPC*, 378 F.2d 510; *In Re Permian Basin Area Rate Cases*, 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC*, 401 F.2d 726 (1968).

3. *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), cert. denied, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), cert. denied, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), cert. denied, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), modified, 223 Kan. 441 (1978).

The Louisiana Court in *Bouite v. Chevron*, 316 F. Supp. 524, said that FERC interest would be payable on the suspense royalty by Chevron when paid.

In Texas, in *Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co.*, 456 F.2d 203 (1972), Phillips was ordered to pay interest on suspense royalties at FPC rates. The Court further said:

> "Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. . . The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, *it became a part of the whole.* Interest was due on so much of the whole as remained unpaid after January 31, 1969." (Emphasis supplied.)

Sun's royalty owners had a legal and equitable right to expect Sun to pay for the use of their money. Sun should have expected to pay for the use of the money. Payments of suspense royalties without interest or mention of interest by Sun was done deliberately, intentionally and knowingly in violation of its royalty owners' rights and interests. Certainly the rulings in this case were no surprise to Sun and it would have been arbitrary and unfair to the Sun royalty owners had they not been allowed interest as was done in the other cases cited in footnote above.

Sun contends that the Kansas Supreme Court ignored contrary Texas law as set out in *Phillips Petroleum Co. v. Stahl*, 569 S.W.2d 480 (Texas, 1978). Stahl asked for

and was awarded interest at the rate of 6% per annum. Phillips' liability for interest at a higher rate was not presented to the Texas Supreme Court, nor did the Texas Supreme Court rule on that point. The *Stahl* case is simply not authority for a *limit* of 6% interest. The issue of whether interest should be allowed at the 6% statutory rate *or* at FERC rates was not presented in the *Stahl* case and was not ruled on by the Texas Courts.

As to the statutory interest rate in *Stahl*, a decision is not a precedent unless the issue is argued and presented to the court. (Corpus Juris Secundum, *Courts*, Section 186.) In *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 97 L.Ed. 54, 73 S. Ct. 67, it is said:

> "Even as to our own judicial power or jurisdiction. this court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."

See also *United States v. More*, (U.S.) 3 Cranch 159, 2 L.Ed. 397. In 20 Am Jur 2d, *Courts*, Section 190, it is stated:

> "It is only a judicial decision on a point of law that is stare decisis, and it is not enough that the point was considered in the prior case; it must have been decided. Stated otherwise no opinion is an authority beyond the point actually decided. It follows that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion."

See *United States v. Mitcheli*, 271 U.S. 9. 70 L.Ed. 799, 46 S. Ct. 418, where it is said:

> "That question was not presented to the court for decision, and no such question was considered or decided. It is not to be thought that a question not raised by counsel or discussed in the opinion of the court has been decided merely because it existed in the record and might have been raised and considered."

See also, *Webster v. Fall*, 266 U.S. 507, 69 L.Ed. 411, 45 S. Ct. 148:

> "Counsel for appellant directs our attention to other cases, where this court proceeds to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Chief Justice Schroeder in the last *Shutts* opinion pointed out that the issue of 6% interest versus interest at FERC rates has not been determined by the Texas Supreme Court. He said:

> "No Texas Court ever mentioned the higher rates set by federal regulations to which Phillips had agreed to comply in its corporate undertaking. See *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (5th Cir.

1975), cert. denied, 423 U.S. 930 (1979); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193; *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Texas, 1978). *This issue has not been determined by the Texas Supreme Court.*" (Appendix to Phillips' Brief, Kansas Supreme Court Opinion, 20a.)

Surely, there can be no constitutional question involved in the Kansas Courts applying the FERC rate, the equitable rate, rather than the statutory rate, when the issue of statutory rate versus equitable rate was not decided in the *Stahl* case.

IV. Judge Renner's Opinion

Honorable Clarence E. Renner in his Memorandum Decision on Remand of this case, in 1986, said in part as follows:

> "The Court has again carefully examined the case law and statutory law of Texas, Oklahoma, Louisiana, New Mexico and Mississippi and compared the laws of each state to the general contract interest law and equitable or moratory interest law as applied by the Kansas Court in *Shutts I* and *Shutts II;* and in this case, I find that all of those states allow a higher interest rate if there is a contract or specific agreement calling for a higher rate of interest, or in situations where equity would require a higher rate; that the equitable or moratory rate is the FERC rate, not the statutory rate; and that there is no conflict with the allowance by the Kansas Court of a contract rate or an equitable agreed rate of interest, the FERC rate, herein to royalty owners resident in other states named above.

> "Although plaintiffs' remedy, the recovery of interest, sounds in equity, the nature of the action is the enforcement of a written agreement which is governed in Kansas by K.S.A. 60-511 and governed in the other states named above by similar statutes concerning payment of interest under written agreements. The Petition states (Pages 2 and 3) that plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on any one or more of the following theories or for the following reasons:
>
> a. The doctrine of unjust enrichment (*Shutts I*);
>
> b. The equitable principle of paying interest on actual use of money belonging to another (*Shutts I*, Syllabus 20);
>
> c. Equitable principles that class members receive the same treatment as gas purchasers as to interest required by FPC (*Shutts I*, Syllabus 21 and 22);
>
> d. Sun made an express agreement by filing corporate undertaking with FPC to pay interest on the 'suspended proceeds' (*Shutts I*, Page 564)."
>
> . . .
>
> "This case has an unjust enrichment feature, a basis in equity. It also has a contract feature, a basis in contract, both the oil and gas leases and the undertaking filed with FPC. Although plaintiffs' remedy may be of an equitable nature, for damages, the basis of the action arises from and grows out of written agreements. If the action is one for damages, that in and of itself does not convert it to something other than an action growing out of written contracts. (See *Baker v. Skinner*, 63 Kan. 83, 64 Pac. 981; and *Thomp-*

son v. Phillips Pipeline Co., 200 Kan. 669, 438 P.2d 146.)

"As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1292 (1977), cert. denied, 434 U.S. 1068 (1978). The only factual distinctions are the numbers involved and that FPC began making its rates nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produced natural gas.

"The Court adopts the choice of law discussion set forth by the Kansas Supreme Court in *Shutts I*. I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I come to the same result concerning FERC interest rates to be applied as before. All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not confiict with the laws of Kansas on the interest rate to be used.

"The interest rates to be applied herein are the FERC interest rates according to 18 C.F.R. 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime

rates averaged and compounded quarterly, as set forth above until date of judgment. . ."

"By accepting the rate increases on the condition of having to repay purchases with interest at FERC rates, even remotely prudent practices dictates that Sun invested the money so as to yield at least 9% which was the FERC rate during all the periods of suspension herein and until payout."

. . .

"Statutes of limitation questions raised by Sun at this time are a nonissue—a dead issue; but this action is not barred by statute of limitation either in Kansas or in the other states involved. . ." (Petition, A23.)

V. Kansas Supreme Court Decision

Sun appealed to the Kansas Supreme Court from Judge Renner's decision. After briefs were filed and the matter was argued orally to the Court, the Court through Honorable Harold Herd, who wrote the previous opinion in this same case, rendered its opinion affirming Judge Renner. Justice Herd has been on the Kansas Supreme Court a number of years. He came from an active practice in Comanche County, a county with substantial oil and gas production.

The opinion refers to the *Shutts* case recently decided and finds that as to interest laws of other states and interest rates applicable, "*Shutts* is controlling and requires us to find the District Court applied the proper prejudgment interest rate."

The opinion also refers to the fact that both sides had requested another notice to class members including a request for exclusion so that there would be no ques-

tion as to jurisdiction over the class members and affirmed the District Court's ruling that Sun should pay for the expense of putting out the notice.

Lastly, the opinion holds that the five year statute of limitations applies, this having been heretofore discussed.

CONCLUSIONS

1. Statute of limitations is not really an issue.

2. If it is an issue, constitutional questions are not involved and the Kansas Supreme Court has made a correct decision.

3. The Kansas Courts have faithfully complied with the mandate to determine and apply the laws of the states where the leases are located. Even though Sun might have wished for a different result, there is no federal question presented by this case and certiorari should be denied.

Respectfully submitted,

W. LUKE CHAPIN
Counsel of Record
GORDON PENNY
CHAPIN & PENNY
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

STEPHEN JONES
JONES & JENNINGS
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

(3)

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

REPLY BRIEF OF PETITIONER

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608
Attorneys for Petitioner

Date: September 30, 1987

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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No. 87-352

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Respondents.

REPLY BRIEF OF PETITIONER

I.

The present action to recover prejudgment interest on gas royalties paid out by Sun Oil Company in July, 1976, and in 1978, was not commenced until August, 1979, more than three years after the 1976 payout. (A3-A4). Accordingly, more than 90% of the claims related to Sun's July, 1976, payout would be barred by the limitations statutes of Texas, Oklahoma and Louisiana. The Kansas Supreme Court did not contest this conclusion, and respondents are unable to cite any authority to the contrary. The gas leases under which petitioner paid the 1/8th fractional royalty did not require interest. The claim was one in equity for unjust enrichment, based on implied contract or quasi-contract, to which the two-year statute of Texas, and the three-year statutes of Oklahoma and Louisiana apply. (Sun's Petition, p. 5, footnote 2).

Being unable to deny the continuing conflict illustrated by *Schrieber v. Allis Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), and *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), respondents choose to ignore the substantial reasons why this Court should decide the constitutional issues arising under the Full Faith and Credit Clause, and the Due Process clause. Respondents cannot dispute the existing conflict in recent decisions, including this very case. They cannot deny the contemporary scholarly criticism of *Schreiber,* and of the broad dictum in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953). Like the emperor who had no clothes, respondents pretend the problem doesn't exist.

Whether the Constitution permits a forum state to disregard the shorter limitations law of the state wherein the claim arose, an issue not directly decided by *Wells,* is an issue far broader and deeper than a mere conflict among the recent decisions, including this case. The flood of problems flowing from technological and commercial disputes in an expanding economy and population, together with widely varying limitations laws among the states, has already catapulted this issue into prominence. One example is the nationwide asbestos litigation, in which a parade of lawsuits are being filed in distant forums having limitations statutes longer than states wherein the claims arose. These include federal forum transfer questions, as in *Ferens,* which depend for their solution on the precise issue here presented. (The National Law Journal, Vol. 10, No. 1, page 1, September 14, 1987, "Courthouse Doors Are Reopened", by Edward A. Adams.) Similar issues are now arising in the burgeoning area of toxic tort litigation, as well as other areas of products liability, commercial tort and contract actions.

Respondents erroneously contend that the limitations issue does not exist in this case because the first Kansas Supreme Court decision (236 Kan. 266, 690 P.2d 385) was vacated by this Court for reconsideration in light of *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985); and *Shutts* did not involve a limitations issue because the suit was brought more promptly. But petitioner, at every stage, has raised its constitutional objections to the application of Kansas law to claims arising in other states. Those objections included failure to recognize the other states' limitations laws, as well as laws governing the liability issue and rate of interest issue found in *Shutts.* Accordingly, this Court's remand for reconsideration in this case required the Kansas courts to reconsider application of other state's laws to the claims before it, including the limitations laws. Certainly nothing in the remand could have removed or rejected Sun's constitutional rights preserved at every stage of this litigation.

Respondents also fail to realize, as the Seventh Circuit has in *Beard v. J.I. Case,* 823 F.2d 1095 (1987), that this Court's *Shutts* decision itself calls into question the conclusions expressed in *Wells* and *Clay* on the limitations issue.

Next respondents seek to support the correctness of the Kansas courts' application of Kansas' longer limitations statute by reference to the dictum in *Wells,* supra; to a hornbook recitation that limitations statutes are "procedural" only, and to *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945).

Wells merely allowed the forum state to apply its own shorter limitations statute. Whether the dictum complained of by Mr. Justice Jackson in dissent, and as criticized by legal scholars, should be limited and made inapplicable to

a forum state seeking to impose its longer statute, is an important and primary question presented. At the same time, we see substantial reasons why this Court should also consider whether a forum state must constitutionally apply the longer limitations statute of the state wherein the claim arose; and thus whether *Wells* should be overruled.

Limitations laws are more than procedural and remedial, in completely barring a claim when time has expired, as legal scholars agree. And merely because a state may describe a limitations statute as "procedural and remedial" for collateral purposes, or even so that it may apply its own limitations law, can never change the real impact on the claim and on the parties. That impact is one of substance because it determines whether a claim is alive or dead. It does not merely govern a procedure for processing a claim, nor choose among potential remedies.

Finally, respondents quote from *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), as though it supported their position. It does not. Justice Jackson (who later dissented in *Wells*) wrote for a unanimous Court, holding that a state may lengthen its own limitations statute applicable to claims arising in that state which are already barred, so long as vested rights are not extinguished:

> ". . . The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation." (325 U.S. at 315).

The Court's opinion noted that *Campbell v. Holt,* 115 U.S. 620 (1885), involving the same issue, had adopted as a "working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." Justice Jackson, while accepting the result and the ultimate holding,

described the above reasoning of *Campbell v. Holt* as "unsatisfactory rationalization." (325 U.S. at 314).

It is just such "unsatisfactory rationalization" which the Third Circuit in *Ferens,* and an array of legal scholars, have rejected in forbidding, on constitutional grounds, the application of the forum state's longer limitations laws to claims barred by the state in which they arose. The foregoing comment in *Chase Securities Corp.* simply reinforces the need to expunge the "unsatisfactory rationalization" that statutes of limitations are remedial for constitutional purposes, to prevent its improper application to the present constitutional issue.

Our constitutional rights, above all rights, emanate from and apply to substance and reality. If governed by an "unsatisfactory rationalization" that limitations laws are merely procedural for constitutional purposes in applying the laws of other states, these basic rights are effectively denied.

The present issue, left open by *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 778 (1984), is ripe for decision, and is squarely presented in this case.

II.

The conflict between the decision below, and this Court's *Phillips* decision, is clear from respondents' brief itself, which tries to explain away the 6% per annum interest rate required by Texas constitutional and statutory law. Respondents, as did the court below, would ignore the 6% rate imposed in *Phillips Petroleum Co. v. Stahl Petroleum Co.,* 569 S.W.2d 480 (Tex. 1980), by arguing that Texas would allow a higher "equitable" rate in such cases, if sought by claimant. The argument that "equity"

would permit a rate higher than Texas' 6% statutory rate was later specifically rejected in *Mo.-Kan.-Tex.R.Co. v. Fiberglass Insul.*, 707 S.W.2d 943, 947 (Tex. Civ. App. 1986, Error Refused, NRE, June 25, 1986):

> "We conclude that *Stahl* allows courts to award prejudgment interest on equitable grounds at the six percent legal rate of art. 5069-1.03 when no statute provides for such a recovery. It thus enlarges the class of cases in which prejudgment interest may be granted without increasing the rate of equitable prejudgment interest that may be awarded."

Yet respondents and the lower court ignore that conclusive ruling rejecting their position concerning *Stahl*, just as they ignore this Court's *Phillips* opinion noting that ". . . Texas has never awarded any such interest at a rate greater than 6%. . . ." (472 U.S. at 817).

Oklahoma, by statute, extinguishes liability for interest if the principal is paid and accepted, as here. Okla. Stat., tit. 23, Sec. 8. Louisiana does not impose liability for interest on a royalty owner who owes a refund for overpayment, under similar circumstances. *Whitehall v. Boagni*, 255 La. 67, 229 So.2d 702 (1969). Interest liability, if imposed, is 6% per annum in Oklahoma, and 7% in Louisiana, as this Court observed in *Phillips*, 472 U.S. at 817. Petitioner does not at all concede that Oklahoma and Louisiana impose liability for interest, as asserted by respondents. Rather, the Kansas courts' patent disregard of rates of interest established by Texas wherein most of the claims arose, as well as by Oklahoma and Louisiana, amply and clearly demonstrates the violation of petitioners' federal constitutional rights, as set forth in *Phillips*.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

GERALD SAWATZKY*
JIM H. GOERING
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

- and -

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

Attorneys for Petitioner

*Counsel of Record

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF KANSAS

JOINT APPENDIX

GERALD SAWATZKY*
JIM H. GOERING
TIMOTHY B. MUSTAINE
FOULSTON SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
Sun Exploration and Production
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608
Counsel for Petitioner

W. LUKE CHAPIN*
CHAPIN & PENNY
122 East Kansas
P.O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611
Counsel for Respondents

*Counsel of Record

Petition for Certiorari Filed August 28, 1987
Certiorari Granted October 19, 1987

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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10–25–79	Answers of Defendant Sun Oil Company (Delaware) to Plaintiffs' Interrogatories
10–25–79	Answer of Defendant Sun Oil Company (Delaware) to Petition
12–04–79	Supplemental Answers of Defendant
11–29–82	Memorandum Brief in Support of Plaintiffs' Motion to Certify as a Class Action
12–23–82	Memorandum of Defendant Sun Exploration & Production Company (formerly Sun Oil Co. [Delaware]) in Opposition to Plaintiffs' Motion to Certify as a Class Action
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9–06–83	Pre-Trial Order (J. 19, P. 678)
9–09–83	Notice of Scheduling Trial, set for 10-13-83
10–13-83	Plaintiff's Evidence and Trial Brief (Trial)

(Filed August 23, 1979)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,	)	No. 79 C 40
Plaintiffs,	)	
vs.	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

(Civil Class Action under K.S.A. Chapter 60)

PETITION

COME NOW the plaintiffs and allege and show to the court:

1) Plaintiff Richard Wortman is a resident of Barber County, Kansas, whose post office address is Medicine Lodge, Kansas 67104. Plaintiff Hazel Moore is a resident of Alfalfa County, Oklahoma; her post office address is Cherokee, Oklahoma 73728. Defendant is a corporation doing business in Barber County, Kansas. Defendant is referred to as "Sun" in this Petition and such designation is intended to include the defendant corporation and any predecessor corporations or subsidiary corporations in making gas payments hereinafter mentioned.

2) Plaintiffs are Sun royalty owners and are members of a class composed of all producers and royalty

owners to whom Sun has made payment of or should make payment of proceeds or royalties purportedly suspended pending finality of Federal Power Commission Opinions Nos. 586, 699, 699H, 749, 749C, 770 and 770A and any other FPC Opinions or FERC Opinions. Copies of various checkstubs and notices going back as far as November, 1968, and not paid until 1977, 1978 and 1979 are hereto attached and made a part hereof.

3) Plaintiffs bring this action individually and as representatives of all that class of producers and royalty owners referred to under Paragraph 2 above. Plaintiffs are informed and believe the class which they seek to represent is composed of over 10,000 members, whose names and addresses are known to Sun, but not to plaintiffs, and number makes it impracticable to join all of them in this action. Plaintiffs are informed and believe that formerly Sun paid the plaintiffs and other class members all of their proportionate share of the proceeds of gas produced and sold; that beginning several years ago, and just when, plaintiffs do not know, Sun began receiving higher prices for the gas sold, but continued paying the class members at the old price. Plaintiffs are informed that Sun commingled such so-called "suspended" money with its own money and invested and used the same for its own purposes. Sun has not paid the plaintiff class or anyone else for the use of such "suspended monies" held by Sun during these periods of time. The Federal Power Commission issued its Opinion No. 586 on September 18, 1970, No. 699 on June 21, 1974, No. 699H on September 4, 1974, No. 749 on December 2, 1975, No. 749C on July 19, 1976, No. 770 on July 27, 1976, No. 770A on November 5, 1976, which approved price escalations in rates for gas paid to Sun which Sun did not pay out to the class

members until dates several years thereafter, the last date being in July, 1979. The total amount of class members' money so held and finally paid over to the class members is not known to plaintiffs, but is known to defendant and is estimated by plaintiffs to be over $1,000,000.

4) The plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on any one or more of the following theories or for the following reasons:

A. The doctrine of unjust enrichment. (*Shutts v. Phillips Petroleum Company,* 222 Kan. 527 P.2d 1292, Syl. 19; U. S. Cert. denied, 434 U.S. 1068, Rehearing denied 435 U.S. 961.)

B. The equitable principle that when one makes actual use of money belonging to another, it is required to pay interest on the money so retained and used. (*Shutts,* supra, Syl. 20.)

C. Equitable principles require that class members receive the same treatment as gas purchasers as to interest required by the Federal Power commission on "FPC suspense monies". (*Shutts,* supra, Syl. 21.)

D. Sun made an express agreement by filing corporate undertaking with the Federal Power Commission to pay interest on the "suspended proceeds". (*Shutts,* supra, Page 564.)

5) The essential question of law and fact involved in this action is common to all members of the class identified above and is as follows:

"Should Sun pay interest to class members on such 'suspended' monies at the rate of seven percent per annum to October 10, 1974, and at the rate of nine

percent per annum thereafter until paid over to class members, in accordance with FPC Order No. 513A, issued July 14, 1976?"

6) The claim of these plaintiffs is typical of all claims of the general class identified above and plaintiffs can and will fairly and adequately protect the interests of such class and all members of the class.

7) Prosecution of separate actions by individual members of the class identified above would result in multiple lawsuits; would create a risk of inconsistent or varying adjudications concerning individual members of the class and could establish incompatible standards of conduct for defendant.

8) The amount of interest due these plaintiffs from defendant is probably less than $1,000.00 each and it is believed and so alleged by the plaintiffs that many of the members of the class identified above have small amounts at stake. As a practical matter, many members of the class would have no remedy if this action could not proceed as a class action.

9) Sun has systematically and purposely withheld the money due the plaintiffs and other members of the class and has used the money for its own purposes. Such action by Sun without compensation to the class members for the use of the money has affected all members of the class in exactly the same way, except as to the amount due each, which can be easily computed through Sun's records and computers. A class action is the only suitable means of redress to the plaintiffs and other class members.

10) The essential question at issue is the matter of collection of interest on money used by Sun for several years and there is a community of interest among all

members of the class in this question and in the remedy. There is a "common fund or funds" set up as to the class, subject to recovery in this action. The members of the class are made up of residents and nonresidents of the State of Kansas, the above FPC opinions being nationwide gas pricing regulations. Class members are those affected by the national rates as set up by the FPC opinions above mentioned, excepting as to No. 586, which was defined by FPC as covering the Hugoton-Anadarko area only.

11) Sun may or may not have paid all class members all "suspense monies" due them because of rate increases approved by the various FPC and FERC opinions and should be required to account for and pay the same as well as to pay interest thereon.

WHEREFORE, plaintiff prays for an order of the court finding that this action is maintainable as a class action; for judgment in favor of plaintiffs and other members of the class for accounting for FPC "suspense monies" and payment of the same and for costs of this action, attorneys' fees and expenses, and for all other proper relief.

Chapin, Penny & Goering
Attorneys at Law
Chapin Building
Medicine Lodge, KS 67104
By /s/ W. Luke Chapin
Attorneys for Plaintiffs

(Filed October 25, 1979)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC, Plaintiffs,	)	Case Number 79 C 40
vs.	)	
SUN OIL COMPANY (Delaware), Defendant.	)	

ANSWER

Defendant Sun Oil Company (Delaware), for its answer to plaintiffs' petition, and for its defense, states:

1. The petition fails to state a claim for relief and should be dismissed.

2. All allegations not admitted herein, are denied.

3. Paragraph 1 of the petition is admitted.

4. As to the allegations in paragraphs 2 and 3 of the petition, it is admitted that plaintiffs are royalty owners under certain oil and gas leases owned by defendant. It is denied that plaintiffs are proper representatives of any class, and it is denied that this action may

properly be brought as a class action. It is admitted that defendant held certain portions of proceeds received from sale of gas in suspense for various periods of time, pending the finality of rate orders involved in the FPC opinions referred to in the petition, but it is denied that the amounts held in suspense were subject to payment of royalty thereon until such time as the amounts held in suspense, or portions thereof, were finally determined to be legal proceeds of the sale of gas. On such determination, defendant paid royalty on the amount approved as legal, and defendant was not liable for interest thereon, because the contract obligation to pay principal was not due and owing until that time.

5. Royalties paid on certain suspense funds accruing under FPC Opinion 586 were paid in 1973. Any claims to interest on such payments, or any payments more than three years prior to commencement of this suit, are barred by the statute of limitations.

6. Plaintiffs are barred by estoppel, waiver acquiescence, payment, accord and satisfaction, and by their own conduct in accepting the principal payment without objection or request for interest.

7. As to paragraphs 4 and 5 of the petition, it is admitted that *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, upheld liability for interest on suspense funds, at certain rates, under the facts there involved. However, the laws of other states differ, making this inappropriate as a class action. Texas, for example, imposed a 6% rate of interest under certain facts involving suspense funds, in *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480. Defendant states that relatively few Sun royalty owners are involved in Kansas gas producing leases, and that most of the royalty owners alleged to

be members of a class actually hold interests in leases located in states other than Kansas or Texas.

8. Alternatively, defendant states that in the event any class is proper in this case, the class must be confined to royalty owners owning interests in leases located in the state of Kansas, under the precautionary rules enunciated by the Kansas Supreme Court.

9. With reference to paragraph 11 of the petition, defendant states that it has paid royalties to its royalty owners on all amounts formerly held in suspense pending final determination by the federal regulatory agency as to the firm, final price to be legally allowed for the sale of gas.

WHEREFORE, defendant prays that the action be dismissed, and that judgment be entered in its favor. Alternatively, no class should be certified, or any class, if certified, should be confined to Kansas royalty owners. Defendant further prays for its costs herein.

William C. Phelps
Sun Gas Company
Three NorthPark East
Box 20
Dallas, Texas 75221
- and -
Foulston, Siefkin, Powers & Eberhardt
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371
By /s/ Gerald Sawatzky
Attorneys for Defendant

(Certificate of Service Omitted in Printing)

(Filed October 25, 1979)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as Representatives of all Producers and Royalty Owners to Whom Sun Oil Company has Made or Should Make Payment of Suspended Proceeds or Royalties Pursuant to FPC Opinions or FERC	)	No. 79 C 40
Plaintiffs,	)	
vs.	)	
SUN OIL COMPANY, a Delaware Corporation	)	
Defendant.	)	

ANSWERS OF DEFENDANT SUN OIL COMPANY (DELAWARE) TO PLAINTIFFS' INTERROGATORIES

NOW COMES Defendant SUN OIL COMPANY (DELAWARE) in response to Plaintiffs' Interrogatories to this Defendant served with a copy of Plaintiffs' Petition, and answers said Interrogatories as follows:

No. 1. According to the corporation's records, how many class members are there in connection with payments under the following FPC opinions:

A. FPC Opinion 586?

ANSWER: There were 4727 interests under 200 properties; however, some owners have interests in more than one of the properties, so that the number of class members is something less than 4,727.

B. FPC Opinions 699 and 699H:

ANSWER: 981

C. FPC Opinions Nos. 770 and 770A?

ANSWER: 1,353

D. FPC Opinions Nos. 749 and 749C?

ANSWER: None

No. 2. Please state the total amounts paid out to class members under each of the following opinions:

A. Under Opinion 586?
ANSWER: $470,223.05

B. Pursuant to FPC Opinions 699 and 699H?
ANSWER: Approximately $1,167,000.00

C. FPC Opinions Nos. 770 and 770A?
ANSWER: Approximately $2,676,000.00

D. FPC Opinions Nos. 749 and 749C?

ANSWER: NONE

E. Are you now holding any FPC or FERC suspense moneys?

ANSWER: Yes

F. If so, how much?

ANSWER: Approximately $150,000.00

G. Pursuant to what opinion or opinions?

ANSWER: FPC Opinion 595 - not paid due to uncertainty as to ownership or division of interest

No. 3. Please state the applicable rate schedules filed by Sun pertaining to each of the opinions mentioned in Paragraph 2 of Plaintiffs' Petition.

ANSWER: See Exhibit 1 attached

No. 4. Please state the name and address of the officer of your company, the head of department of your company, and the executive or employee of your company in charge of accounting for suspense gas royalties as described in the Plaintiffs' Petition.

ANSWER: John D. West, Manager, Gas Lease Revenue Accounting, Sun Gas Company, III NorthPark East, 8800 North Central Expressway, P. O. Box 20, Dallas, Texas 75221

No. 5. Please state whether or not in paying over any of the money to the class members as described in Paragraph 2 of Plaintiffs' Petition any interest on the proceeds theretofore held in suspense by Sun was paid to the producers or royalty owners.

ANSWER: Yes, in some instances interest was paid in settlement of certain claims, but generally no interest has been paid.

No. 6. Will you, without motion to produce, file true copies of such corporate undertakings or bonds filed with FPC according to FPC Rules and Regulations pertaining to escalated gas prices received by you and subject to refund?

ANSWER: Yes

No. 7. Were the "suspense moneys" placed in any savings account or were they merely placed in the corporate treasury and used the same as any other corporate funds?

ANSWER: No "suspense moneys" were placed in any savings account. Such moneys were placed in the corporate treasury and used the same as other corporate funds.

No. 8. Will you, without motion to produce, furnish copies of your annual reports, 1974-1978, showing profit and loss statements?

ANSWER: Yes

William C. Phelps
Sun Gas Company
Three NorthPark East
P. O. Box 20
Dallas, Texas 75221

Foulston, Siefkin, Powers & Eberhardt
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316—267-6371
By /s/ Gerald Sawatzky
Gerald Sawatzky
Attorneys for Defendant

(Jurat and Certificate of Service Omitted in Printing)

EXHIBIT 1

RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
	1		1	
	6		6	6
		8		8
	9		9	9
	11		11	11
	13	13		13
	17			17
	18	18	18	
	20	20	20	
	21	21		
		23		
	24			24
	26		26	
	27		27	27
	28		28	28
	30	30		
	33		33	33
	35		35	
	37		37	
	38			
	41		41	41
	42		42	42
		47		
		49		
	58	58		
	60			

RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA INDICATING VARIOUS OPINIONS NOS. AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA INDICATING VARIOUS OPINIONS NOS. AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA INDICATING VARIOUS OPINIONS NOS. AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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RECAP OF FERC (FPC) SCHEDULES BY AREA INDICATING VARIOUS OPINIONS NOS. AFFECTING REFUND OF PROCEEDS

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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

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RECAP OF FERC (FPC) SCHEDULES BY AREA
INDICATING VARIOUS OPINIONS NOS.
AFFECTING REFUND OF PROCEEDS

#586	#699	#749	#770	#595
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(Filed December 4, 1979)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as Representatives of all Producers and Royalty Owners to Whom Sun Oil Company has Made or Should Make Payment of Suspended Proceeds or Royalties Pursuant to FPC Opinions or FERC	)	No. 79 C 40
Plaintiffs,	)	
VS.	)	
SUN OIL COMPANY, a Delaware Corporation	)	
Defendant	)	

SUPPLEMENTAL ANSWERS OF DEFENDANT SUN OIL COMPANY (DELAWARE) TO PLAINTIFFS' SUPPLEMENTAL INTERROGATORIES OF NOVEMBER 9, 1979

NOW COMES Defendant SUN OIL COMPANY (DELAWARE) in response to Plaintiffs' Supplemental Interrogatories to this Defendant, and answers said Interrogatories as follows:

1. Referring to FERC (FPC) schedules indicating refund of proceeds under FPC Opinion 749, attached to answers to first interrogatories, please state the following:

A. Under which rate schedule numbers were higher rates collected:

ANSWER: Sun Rate Schedule Numbers 94, 353, 431, 479, 505, 512, 516 and 529

B. Under which of the same rate schedules was a portion of the royalty payments withheld?

ANSWER: None

C. As to any increased proceeds not paid currently, when were such increased proceeds paid over to the royalty owners, to how many of them, and in what total amounts?

ANSWER: Not applicable since no portion of payments were withheld.

2. Please furnish copies of any and all general notices, memoranda or letters that went out to royalty owners pertaining to gas royalty payments under FERC (FPC) Opinions 586, 699, 749 and 770, showing dates of mailing as to each such notice, memoranda or letter.

ANSWER: Copies of all general notices, memoranda and letters which were mailed to royalty owners pertaining to gas royalty payments under FERC (FPC) Opinions 586, 699, 749, and 770 are attached. Letters relating to FPC Opinion 699 are undated but were mailed in October 1975. Other notices or letters were mailed on the approximate date appearing thereon. The only notice pertaining to FPC Opinion 586 was the notice which was included with checks mailed to interest owners, a copy of which was attached to the check referred to in Interrogatory No. 6.

3. Will you without motion to produce please furnish copies of all rate schedules filed as listed under Opinion No. 749 in answers to the first interrogatories beginning with No. 8 and ending with No. 583?

ANSWER: No. Because of the number of rate schedules involved and the bulk thereof reproduction would be very costly. Copies of such rate schedules are in the offices of SUN GAS COMPANY, in Dallas, Texas, and will be made available for inspection at that location during regular office hours upon proper request.

4. Please furnish copy of corporation undertaking as stated you would do in answer to first set of interrogatories, No. 6.

ANSWER: Attached is a copy of the corporate undertaking filed under Sun Rate Schedule No. 94. Corporate undertakings, in substantially the same form, were filed under each of the rate schedules when required.

5. Please furnish copies of annual reports, 1974 - 1978, showing profit and loss statements in accordance with your answer to Interrogatory No. 8 in first set of interrogatories.

ANSWER: Copy of the annual reports of Sun Oil Company and Sun Company, Inc., for the years 1974 - 1978 are attached.

6. With reference to the attached check stub and notice, check being dated August 28, 1978, to Owner No. 986030, representing gas royalties November, 1968, through November, 1970, please give detail of such payment as shown in the check stub and state pursuant to which FPC Opinion such payment was made.

ANSWER: This check covers payment of the payee's share of gas royalties suspended under

FPC Opinion 586 for the period stated, under the J. M. Wortman Lease in Barber County, Kansas. This lease was owned and operated by Sunray DX Oil Company prior to its merger into Sun Oil Company. The detailed work papers upon which the amount due was calculated cannot be located.

7. Do you agree that FPC Order No. 513A issued July 14, 1976, copy of which is attached, governs payment of interest on any moneys to be refunded to gas purchasers, pursuant to Opinions 699, 749, and 770?

ANSWER: This interrogatory is objected to on the grounds that it calls for a legal conclusion

William C. Phelps
Sun Gas Company
Three NorthPark East
P. O. Box 20
Dallas, Texas 75221

Foulston, Siefkin, Powers & Eberhardt
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316—267-6371
By /s/ Gerald Sawatzky
Gerald Sawatzky
Attorneys for Defendant

(Jurat and Certificate of Service Omitted in Printing)

(SUNOCO)
SUN OIL COMPANY

Southland Center, Post Office Box 2880,
Dallas, Texas 75221 (214) 744-4411

December 8, 1976

To Royalty Owners:

Re: Federal Power Commission
Opinion No. 770-A

On July 27, 1976, the Federal Power Commission issued Opinion No. 770 establishing nationwide rates for "new gas." On the basis of the contentions set forth in applications for rehearing, and after further examination by the Commission, Opinion No. 770-A was issued November 5, 1976, clarifying and amending Opinion No. 770.

Appeals of this decision have been filed with the Third, Fifth, Ninth, Tenth and District of Columbia Circuit Courts of Appeal; therefore, neither the rates nor the categories of gas established in Opinion No. 770-A, will be finally determined until the settlement of court appeals.

In light of court review, Sun will continue to make payment of royalty based on the applicable rates previously approved by the Federal Power Commission. Sun will account to you fully for any additional sums which may be due you in the event the applicability of Opinion No. 770-A is finally upheld.

Very truly yours,

Sun Oil Company

(SUNOCO)
SUN GAS COMPANY

Southland Center, Post Office Box 2880,
Dallas, Texas 75221 (214) 744-4411

September 9, 1976

To: Interest Owners With Whom Sun Makes Settlements for Gas Moving Under Contracts Subject to FPC Opinion No. 749

Re: Federal Power Commission
Opinion No. 749

In Opinion No. 749, the Federal Power Commission established just and reasonable rates for natural gas sold from wells commenced and dedicated prior to January 1, 1973. Appeals of this decision have been filed with the Court of Appeals for the Fifth Circuit and, therefore, the rates established in Opinion No. 749 will not become final until completion of that Court review.

Although the rates established by Opinion No. 749 may be reduced as a result of these Court appeals, Sun will make payment for gas which qualifies based upon the rates established in Opinion No. 749.

In the event judicial proceedings result in the establishment of a lower rate than that upon which Sun is basing its payments and where required by the Federal Power Commission to refund with interest any part of payments made to you in excess of the rate finally permitted, we will expect to recoup same on a reasonable basis.

Yours very truly,

Sun Oil Company (Delaware)

(SUNOCO)

North American Exploration
and Production Group
Production Division
Natural Gas Sales

SUN OIL COMPANY

Southland Center, Post Office Box 2880
Dallas, Texas 75221 (214) 744-4411

Re: Federal Power Commission
Order No. 699-H
Replacement Contracts

To Royalty Owners:

As you are probably aware, the Federal Power Commission issued Opinion No. 699-H last year which set a National Rate for "new gas." It contained a provision to extend this rate to "old gas" covered by replacement contracts dated after January 1, 1973. Your recent royalty payments have been based upon gas prices covered by such a replacement contract.

Until now, Sun has paid royalties to you based on the new National Rate although Opinion No. 699-H is involved in litigation attempting to reduce this National Rate. Recently another suit has been filed challenging the specific applicability of the National Rate to replacement contracts dated after January 1, 1973.

In light of this recent suit, Sun will discontinue payment of royalty based upon the National Rate and instead will make royalty payments on the basis of the applicable rate previously approved by the Federal Power Commission. We will account to you fully for any sums which

may be due you in the event the applicability of the National Rate to replacement contracts is finally upheld.

In the event the judicial proceedings result in the establishment of a lower rate than that upon which Sun has heretofore based its payments to you and we are required by the Federal Power Commission to refund any part of payments made to you in excess of the rate finally permitted we will expect to recoup all amounts ordered to be refunded, on a reasonable basis.

Sun Oil Company (Delaware)

(SUNOCO)

North American Exploration
and Production Group
Production Division
Natural Gas Sales

SUN OIL COMPANY

Southland Center, Post Office Box 2880,
Dallas, Texas 75221 (214) 744-4411

Re: Federal Power Commission
Order No. 699-H

To Royalty Owners:

The Federal Power Commission has issued Opinion No. 699-H which prescribes a National Rate ceiling for qualifying natural gas sold in interstate commerce under certain conditions after January 1, 1973. However, in view of present pending court appeals of this decision, these rates will not become final until completion of litigation.

Although there is a possibility that the rates established by Opinion No. 699-H may be reduced as a result of the court review, Sun is paying royalty on gas which qualifies for the new rate (except in those instances where a replacement contract serves as the basis for collection of the National Rate) based on the assumption that Opinion No. 699-H will be confirmed. A separate letter is being sent to those royalty owners involved where replacement contracts serve as the basis for collection of the National Rate.

In the event judicial proceedings result in the establishment of a lower rate than that upon which Sun has

based its payments, and we are required by the Federal Power Commission to refund any part of payments made to you in excess of the rate finally permitted, we will expect to recoup all amounts ordered to be refunded, on a reasonable basis.

In view of all of the uncertainties that now exist and will continue to exist until the order is judicially reviewed, we feel that the plan outlined above is to the best interest of both Sun and the royalty owners.

Sun Oil Company (Delaware)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of	)	
	)	Docket No. RI63-264
Sun Oil Company	)	

AGREEMENT AND UNDERTAKING OF SUN OIL COMPANY TO COMPLY WITH THE PROVISIONS OF SUBSECTION (C) OF SECTION 154.102 OF THE COMMISSION'S REGULATIONS UNDER THE NATURAL GAS ACT

Sun Oil Company is filing concurrently herewith a Motion Pursuant to Section 4(e) of the Natural Gas Act to make effective Supplement 3 to its FPC Gas Rate Schedule 94.

In conformity with the requirements of Section 154.102 of the Commission's Regulations Under the Natural Gas Act, Sun Oil Company hereby agrees and undertakes to comply with the provisions of subsection (c) of said section, insofar as it is applicable to the adjustment filed in this proceeding and has caused this agreement and undertaking to be executed and sealed in its name by its officers thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto this 22nd day of May, 1963.

Sun Oil Company
By /s/ (Illegible)
Vice President

ATTEST:

/s/ (Illegible)
Secretary

Corporate Seal

(Filed January 11, 1983)

IN THE
DISTICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all royalty owners to whom Sun Oil Company or Sun Gas Company has made payment of suspended royalties pursuant to FPC Opinions or FERC Opinions, Plaintiffs,	)	Case No. 79 C 40
vs.	)	
SUN OIL COMPANY, a Delaware Corporation, Defendant.	)	

JOURNAL ENTRY ON CLASS CERTIFICATION AND NOTICE

NOW, on this 5th day of January, 1983, this matter comes on for hearing on plaintiffs' motion to certify as a class action and determine notice. The following appearances are made:

Attorneys for plaintiffs: W. Luke Chapin, Chapin, Penny & Goering, P. O. Box 148, Medicine Lodge, Kansas 67104; Ed Moore, Ginder & Moore, 202 South Grand, Cherokee, Oklahoma 73728;

Attorneys for Defendant: R. Douglas Reagan of Foulston, Siefkin, Powers & Eberhardt, 700 Fourth Financial Center, Wichita, Kansas 67202.

THEREUPON, the motion is presented and argued to the court, the matters having been previously briefed

by counsel. The court, having read the briefs and heard the argument of counsel, and based upon the files and records in this matter and the evidence presented, finds, and it is ordered, adjudged and decreed as follows:

1) The proposed class of parties plaintiff is numerous and exceeds 2,300 members and an actual joinder of all members is impracticable.

2) The claims of plaintiffs are typical of the claims of all of the members of the class except that each owner may be entitled to a different amount of interest and the interest to each owner, if allowed, would be too small to enable each to file a separate action.

3) The only questions of law and fact in this case are common to the entire proposed class, in that the sole issue appears to be whether defendant is liable for interest on the money received by it from purchasers of gas pursuant to Opinions 586, 699 and 770 of the Federal Power Commission and withheld by defendant for certain periods after August 23, 1974.

4) This action should be certified as a class action and plaintiff class is defined as follows:

> "All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties after August 23, 1974 through 1979, pursuant to Federal Power Commission Opinions Nos. 586, 699, 699H, 770 and 770A."

5) Notice of the pendency of this action, its nature and effects of any judgment shall be given to all members of the class. The form of such notice, which is approved by the court, is attached hereto and made a part hereof. The defendant shall provide to the plaintiffs a list of all members of the class and their mailing addresses as shown by defendant's records. The defendant shall provide to plaintiffs, if possible, pressure sensitive mailing labels for each member of the class which shall contain thereon their individual name and address. The plaintiffs shall cause the notice to be mailed to all members of the class by first class mail and plaintiff shall bear all expense thereof, same to be made a part of the costs of this case. The envelopes shall contain the following return address:

> Return to: Chapin, Penny & Goering, Box 148, Medicine Lodge, Kansas 67104.

The notice is to be dated March 1, 1983, and request for exclusion must be filed by April 5, 1983.

6) If any of the notices sent to class members are returned by the postal service as nondeliverable, the plaintiffs will notify defendant of the names; and defendant is to further check its records and provide plaintiffs with all information it has pertaining to such class member, so that notice may be provided to such person, and/or person's heirs, devisees or assigns.

7) The plaintiffs' Motion to Certify as a Class is is hereby sustained. All prerequisites of a class action according to Kansas statutes have been met. Although there may be only a limited number of Kansas residents involved, as stated in *Shutts v. Phillips Petroleum Company*, 222 Kan. 527, this class action is the only way in which the "small man" can find relief.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

(Counsel's Approval of Form Omitted in Printing)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC Opinions,	)	No. 79C40
Plaintiffs,	)	
vs.	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

NOTICE OF CLASS ACTION SUIT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

This suit was filed in August, 1979, by plaintiffs, individually and on behalf of all royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs ask judgment against defendant for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by defendant subsequent to August 23, 1974. The leases involved are Sun's leases, nationwide. There are in excess of 1,000 gas royalty owners and overriding royalty owners who are members

of the proposed class and the above mentioned payments were in excess of $3,000,000.00.

Defendant Sun has denied any liability to plaintiffs or members of the class herein described.

The court has held that this action is to be maintained as a class action. Accordingly:

1. The court will include as members of plaintiff class herein all of the gas royalty owners and overriding royalty owners addressed above; provided, however, any person or concern so included may be filing a written request to the Clerk of the District Court of Barber County, Kansas, Medicine Lodge, Kansas 67104, on or before the 5th day of April, 1983, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd, out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees, costs or expenses against you.

4. If you want further information, please do not call the Judge or Clerk of the Court, but call or write one of the attorneys listed below.

Dated: March 1, 1983.

Clarence E. Renner,
District Judge

Attorneys for Plaintiffs:

W. Luke Chapin
Chapin, Penny & Goering
P. O. Box 148
Medicine Lodge, KS 67104
(316) 886-5611

Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, OK 73728
(405) 596-2106

Attorneys for Defendant:

Gerald Sawatzky
Foulston, Siefkin, Powers
& Eberhardt
700 Fourth Financial Center
Wichita, KS 67202
(316) 267-6371

William C. Phelps
Sun Gas Company
Three North Park East
Dallas, TX 75221

(Filed May 23, 1983)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC, Plaintiffs, vs. SUN OIL COMPANY, a Delaware Corporation, Defendant.	)	No. 79C40

JOURNAL ENTRY ON MOTION FOR WITHDRAWAL

ON this 18th day of May, 1983, at nine o'clock a.m., the motion of attorneys for plaintiff class to withdraw as attorneys for plaintiff class member Phillips Petroleum Company comes regularly on for hearing. Plaintiff class appears by and through W. Luke Chapin of Chapin, Penny & Goering, Medicine Lodge, Kansas. There are no other appearances, except that Sun Oil Company has written the court through its attorney, R. Douglas Reagan of Foulston, Siefkin, Powers & Eberhardt, requesting that it be excused from appearing as it has no interest in the motion; and Phillips Petroleum Company has written to the court through T. L. Cubbage II, its attorney, expressing its views of the motion.

THEREUPON, the motion is presented to the court by counsel for plaintiff class. The court, having reviewed

the motion, having heard the arguments of counsel, and being well and fully advised in the premises, finds that plaintiff class counsel might be representing conflicting interests or taking inconsistent positions in the matter; but that Phillips Petroleum Company, defendant in Seward County, Kansas, Case No. 79C113, and a plaintiff class member in this case, has consented, after full disclosure, to plaintiff class representing Phillips in this case; and that motion of plaintiff class attorneys for withdrawal of representation of Phillips should be overruled.

IT IS THEREFORE BY THE COURT ORDERED that motion of plaintiffs' attorneys to withdraw from representation of class member Phillips Petroleum Company be and it is hereby overruled.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

(Counsel's Approval of Form Omitted in Printing)

(Filed September 6, 1983)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC Opinions,	)	Case No. 79C40
Plaintiffs,	)	
vs.	)	
SUN OIL COMPANY, a Delaware corporation,	)	
Defendant.	)	

PRE-TRIAL ORDER

On the 2 day of Sept., 1983, a pre-trial conference was had in the above entitled case, plaintiff class being represented by W. Luke Chapin of Chapin, Penny & Goering, Medicine Lodge, Kansas, and Ed Moore of Ginder & Moore, Cherokee, Oklahoma; and the defendant, Sun Oil Company, being represented by Gerald Sawatzky and R. Douglas Reagan of Foulston, Siefkin, Powers & Eberhardt, 700 Fourth Financial Center, Wichita, Kansas.

WHEREUPON, after considering the arguments and stipulations of counsel, the pleadings, depositions, interrogatories, admissions and exhibits submitted, the court made the following order.

I. PARTIES

The plaintiffs in this action are Richard Wortman, who is a gas royalty owner under a Kansas oil and gas lease to whom Sun accounts for his gas royalties, and Hazel Moore, who is a gas royalty owner under an Oklahoma oil and gas lease to whom Sun accounts for her gas royalties. Both appear individually and as representatives of a class of persons defined as follows:

> "All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties after August 23, 1974, through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 770A." (Journal Entry on Class Certification dated January 5, 1983.)

Plaintiffs will hereinafter, either individually or as representatives of the class, be referred to as "Wortman". The defendant is Sun Oil Company, hereinafter referred to as "Sun".

II. NATURE OF THE CASE

This class action against Sun seeks to recover interest on additional or suspense gas royalties paid by Sun at various times from and after August 23, 1974, relating to the above mentioned FPC and FERC Opinion Nos. 586, 699, 699H, 770 and 770A, to its royalty owners and overriding royalty owners subsequent to approval by FPC and FERC and the courts of certain proposed rate increases on gas sales in the six states of the United States where Sun is engaged in producing natural gas. (Sellers Affidavit dated December 21, 1982.)

III. AMENDMENTS

Both Wortman and Sun request permission, and such permission is granted, to amend their pleadings to conform to the contentions made and theories presented in this Pre-Trial Order, and the same is considered done.

IV. STIPULATIONS

1) Both Wortman and Moore have received royalties previously suspended pursuant to one or more of the above mentioned FPC or FERC Opinions.

2) Sun did not pay any interest on the suspended royalties which were eventually paid to the plaintiffs and the plaintiff class pursuant to the above mentioned FPC and FERC Opinions.

3) Opinion No. 586 involves only the Hugoton-Anadarko area as defined by FPC and which consists of all of the State of Kansas and parts of the States of Oklahoma and Texas.

4) Beginning with Opinion 699, the FERC eliminated the area by area pricing scheme it had been employing and established a nationwide rate for qualified gas. Additionally, Opinions 699, 699H, 770 and 770A set certain rates governing the sale of natural gas in interstate commerce. During the pendency of subsequent administrative and court appeals involving these opinions, Sun began receiving money at the increased rates set forth in these opinions but did not pay the increase out to its royalty owners.

5) Through the use of notice slips accompanying regular royalty checks, Sun informed the royalty owners that until final approval of the various opinions, payment of the increased proceeds would be suspended. Copies

of notices are attached, marked Exhibits 1 to 3. (Answers to Interrogatories dated November 9, 1979.)

6) Under Opinion 586, there were 4,727 interests paid $470,223.05; but it is believed that only about $13,000.00 has been paid since 1973, this money having been accumulated November, 1968, through November, 1970, but not paid out to royalty owners until on or about August 28, 1978. (Supplemental Answers of Defendant Sun to Plaintiffs' Supplemental Interrogatories of November 9, 1979; and Sellers Affidavit of December 21, 1982.)

7) Under Opinions 699 and 699H, 981 interest holders nationwide received $1,167,000.00 in suspense royalties in July, 1976, same having been accumulated from about January, 1975. (Sellers Affidavit of December 21, 1982.)

8) Under Opinions 770 and 770A there were about 1,353 interest holders, nationwide, who received suspended royalties of about $2,676,000.00, same having been accumulated from December of 1976, (Sellers Deposition page 35 and paid out principally in April, 1978.)

9) Sun has admitted that no interest was paid on proceeds held in suspense that were ultimately paid to the royalty owners. (Answers to First Interrogatories, No. 5 and Sellers Deposition, Page 24.)

10) The court has ordered that plaintiffs Wortman and Moore are members of a class of approximately 2,300 members of royalty owners and overriding royalty owners who received suspense royalties from Sun as a result of Opinion Nos. 586, 699, 699H, 770 and 770A pertaining to gas rates. First class mail notice has been mailed to all of such royalty owners in accordance with pressure sensitive mailing labels furnished for each member of the class by Sun. Plaintiffs have caused the notices to be mailed

and has borne the expense thereof. As a result of the notice, 105 members of the class have specifically excluded.

V. PLAINTIFFS' CONTENTIONS

1) Wortman and plaintiff class contend that as to all gas royalty owners to whom Sun was accounting, Sun collected all proceeds from the proposed increased rates including that fraction or percentage increase which belonged either to royalty owners or to purchasers and could in no event belong to Sun. The money belonging to others was deposited to cash in Sun's general account and commingled with its other funds during the suspension periods.

2) On termination of suspension periods according to the stipulations, Sun again began paying all of its royalty owners and overriding royalty owners to whom it accounted, royalties based on the increased prices and also paid the back royalties of suspense royalties on FPC or FERC monies.

3) FPC or FERC suspense monies were placed in the corporate treasury and used the same as any other corporate funds. (First Interrogatories, No. 7; and George Wehrmaker Deposition, Page 9.)

4) Meanwhile, Sun made substantial profits, after taxes and interest expenses, the amount for the United States being $367,000,000.00 in 1979. (Sun annual reports and George Wehrmaker Deposition, Pages 6-7.)

5) Sun handled the suspense royalties for all royalty owners nationwide in the same manner and they were paid out at the same time in the same manner. (Sellers Deposition, Page 21.)

6) Sun furnished to the Federal Power Commission an agreement and undertaking to comply with the provisions of Subsection C of §154.102 of the Commission's regulations under the Natural Gas Act, copy of which is attached hereto marked Exhibit 4, same having been furnished in connection with supplemental answers of defendant Sun to plaintiffs' supplemental interrogatories of November 9, 1979.

7) Copy of 18 CFR §154.67 and Federal Reserve Bulletins on prime rate charged by banks are hereto attached.

8) As to the approximate $13,000.00 paid out in 1978 under Opinion 586, plaintiff class is entitled to interest on the same from the time first suspended in the 1960's until paid out. Interest was at varying rates, according to FPC order, 18 CFR 154.67, at 7% simple interest until October 10, 1974, at 9% simple interest between October 10, 1974, and date of payout in 1978.

9) As to interest on other suspended royalties under Opinions 699, 699H, 770 and 770A, Wortman and plaintiff class contend they are entitled to interest in the same manner as refund obligations under CFR 18, 154.67(d) at the rate of seven percent (7%) simple interest per annum until October 10, 1974; at a rate of nine percent (9%) simple interest per annum between October 10, 1974, and September 20, 1979; and at an average prime rate for each calendar quarter thereafter, compounded quarterly at the arithmetic mean, to the nearest 100th of one percent, of the prime rate values published in the Federal Reserve Bulletin, for the fourth, third and second months preceding the first month of the calendar quarter.

10) Wortman and the plaintiff class contend there is only one general issue of law and fact in the case: namely, the payment of interest at the rates above stated, and compounded quarterly beginning October 1, 1979, on the common fund which Sun expressly contracted and agreed to pay to the gas purchasers, if required, according to its express agreement and corporate undertaking with the FERC, or to its royalty and overriding royalty owners according to the United States Rule, as set forth in *Shutts, Executor v. Phillips Petroleum Company,* 222 Kan. 527, at Pages 564-569.

VI. DEFENDANT'S CONTENTIONS

Defendant contends that it paid the royalty owing to the plaintiff class members at the time the royalty became due and payable. Defendant was not obliged to pay royalty on amounts held in suspense, until such time as it was finally determined to be legal proceeds of sale. At that time defendant promptly paid the royalties when due.

The statute of limitations bars any recovery related to amounts paid out more than three years prior to the commencement of this action; or in the alternative, more than four years prior to commencement (Texas law, Article 5527 Vernon's Civil Statutes); or in the second alternative, more than five years prior to commencement.

Plaintiffs are barred by estoppel, waiver, acquiescence, payment, accord and satisfaction, and in accepting the principal payment without objection or request for interest.

If any interest is owing, it would be at the rates specified in each of the various states where gas was produced; not at the rates claimed by plaintiffs. For instance, in

Texas, the rate is 6% per annum simple interest running from a date 30 days after it is due and payable. (Article 5069-1.03, Vernon's Civil Statutes).

Defendant preserves its objection to the propriety of the class certified herein; and preserves its objection that the certification relating to absent class members in other states is a denial of due process to the absent members, and to this defendant. Further, the contact of Kansas royalty owners is so minimal and the number so small as to require this action to be limited to Kansas royalty owners. Out of state royalty owners have nc contact with Kansas, and Kansas courts are without jurisdiction of them under the facts of this case.

Defendant further contends that certain royalty payments were deferred because of disputes as to title, or delay by royalty owners in processing transfer or inheritance papers, or changes of address. No interest is owing on such suspensions of royalty payments.

VII. PLAINTIFFS' WITNESSES

The plaintiffs may call the following witnesses at the trial of this case, either as live witnesses or by deposition.

1. Richard Wortman, plaintiff
2. Hazel Moore, plaintiff
3. Edwin H. Sellers, Dallas, Texas
4. George Wehrmaker, Dallas, Texas

VIII. DEFENDANT'S WITNESSES

E.H. Sellers

IX. DEFENDANT'S EXHIBITS

Exhibits attached to affidavits and answers to interrogatories.

Any additional exhibits will be listed within 30 days after entry of this order.

X. PLAINTIFFS' EXHIBITS

1. Any and all exhibits attached to Sun's Answers to Interrogatories and Requests for Admissions and Answers to Interrogatories.

2. 18 CFR §154.67

3. Federal Reserve Bulletins, June 1979 to date

XI. CONDUCT OF TRIAL

The parties hereto waive the right to a jury trial on any of the issues herein and consent to the trial of all such issues to the court.

XII. SETTLEMENT POSSIBILITIES

There are no settlement negotiations pending.

This being a class action, any proposed settlement would require court approval.

XIII. PRE-TRIAL ORDER SUPERSEDES PLEADINGS

The Pre-Trial Order entered herein shall control the further course of this litigation and shall supersede all of the pleadings previously filed herein.

/s/ Clarence E. Renner
District Judge

(Counsel's Approval of Form Omitted in Printing)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,	)	Case No. 79C40
Plaintiffs,	)	
-vs-	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS

PROCEEDINGS had before the Honorable Clarence E. Renner, Judge of the District Court of Barber County, Kansas, at Medicine Lodge, Kansas, on the 13th day of October, 1983.

APPEARANCES:

The plaintiffs, RICHARD WORTMAN, et al., appeared in person and by Mr. Luke Chapin, CHAPIN, PENNY & GOERING, Chapin Building, Medicine Lodge, Kansas; and Mr. Ed Moore, Attorney at Law, Cherokee, Oklahoma.

The defendant, SUN OIL COMPANY, appeared by Mr. Gerald Sawatzky, FOULSTON, SIEFKIN, POWERS & EBERHARDT, 700 Fourth Financial Center, Wichita, Kansas; and Mr. William Phelps, Attorney at Law, Dallas, Texas.

* * *

* * * [7] "Sun has admitted that no interest was paid on proceeds held in suspense that were ultimately paid to the royalty owners." No. 10, relates to the notice and number of numbers. "The court has ordered that plaintiff Wortman and Moore are members of a class of approximately 2,300 members." Now, the court will recall that it was said in the order that Sun would furnish pressure sensitive labels to the plaintiff to mail out notices which they did, but instead of 2,300 members there were actually 3,159 notices that, or gummed labels that were received and we mailed out 3,159 letters to "royalty owners and overriding royalty owners who received suspense royalties from Sun as a result of Opinion Nos. 586, 699, 699H, 770 and 770A pertaining to gas rates. First class mail notice has been mailed to all of such royalty owners in accordance with pressure sensitive mailing labels furnished for each member of the class by Sun. Plaintiffs have caused the notices to be mailed and have borne the expense thereof. As a result of the notice, 105 members of the class have specifically excluded. . .", and according to our count, "(51 addressees did not receive the notice) leaving total notices received by class members of 3,003." According to George Wehrmaker's deposition, and we attach certain pages from that deposition, the money from FPC suspense gas was used by Sun just as any other cash or money used to make a profit [8] and if we might turn to that deposition, which is attached as Exhibit 4, or I don't know how the court would prefer that I do this, it is rather short. I could read it or I could simply refer to certain testimony in that.

THE COURT: I have read the deposition and I think it may expedite the matter if you want to just refer to the specific testimony that you wish to inform about.

MR. CHAPIN: All right.

THE COURT: Unless—Mr. Sawatzky, is that agreeable with you?

MR. SAWATZKY: Well, that's agreeable, basically I think our position is that most of that testimony is really irrelevant. The fact that Sun made a profit is undisputed. I don't think whether they made a profit or didn't make a profit is material to the question of whether interest is or isn't owing.

MR. CHAPIN: Well, of course we think it is material. It's a part of our case that Sun used our royalty owners' money and used it to make a profit and so we simply want to show they made a profit and Mr. Wehrmaker's deposition does show that together with the exhibits, which is Sun's annual report for 1979, and the court has that with the other papers and we do offer the annual report of Sun for 1979 at this time.

MR. SAWATZKY: Well, we don't really think it's * * *.

* * *

[11] "Q. Used to make a profit?"

"A. I hope so, yes."

And that's all of the direct. Going back then we refer to the annual report in paragaph 14, meanwhile Sun made substantial profits while using royalty owners money. The amount for the United States being preentered $367,000,000.00, that profit in 1979, according to Sun's annual report. No. 15: "Sun handled the suspense royalty owners nation-wide in the same manner and they were paid out at the same time in the same manner." No. 16: "Sun furnished to the Federal Power Commission an agreement and undertaking to comply with the provisions of Subsection (c) of §154.102 of the Commission's regulations under the Natural Gas Act, copy of which is attached hereto marked Exhibit "7", same having been

furnished in connection with supplemental answers of Sun. . .", and we now offer Exhibit 7, which is a copy of the obligation of Sun to take care of interest obligations to purchasers pursuant to the subsection mentioned.

THE COURT: Now 7 is what?

MR. CHAPIN: Well, that—

THE COURT: —I don't have an exhibit marked 7 on this pre-trial or trial brief.

MR. CHAPIN: There should be. I think there is at the end of it.

[12] THE COURT: I have it, yes, thank you.

MR. CHAPIN: That's Sun's obligation filed with the FPC.

THE COURT: You offer it?

MR. CHAPIN: Yes.

THE COURT: Any objection?

MR. SAWATZKY: No objection.

THE COURT: 7 will be admitted.

MR. CHAPIN: Now, we further offer the next exhibit, which is a copy of 18 FPC 154.67 and Federal Resever Bulletins on prime rates charged by banks and this shows the obligation of a gas producer to pay interest on any monies that might be refunded to gas purchasers. According to *Shutts 1*, that obligation extends to royalty owners in that interest in the same manner—damages in the form of interest in the same manner are due royalty owners and so we do offer this particular 18 FPC and certificate of the Federal Serve Bulletins. We don't have them on down to date, but the bulletins attached show prime rate charged by banks on short term business loans, which is the applicable rate in figuring interest which is to be compounded quarterly. We offer this as Exhibit 8.

MR. SAWATZKY: Well, Your Honor, I—this Federal Reserve Bulletin, I don't quite understand it. I'm * * *.

* * *

* * * [33] I wasn't sure exactly what portions, I guess, those are attached to those findings, but the depositions are fairly short and I guess Mr. Sellers we need not present his deposition, because he was here on the stand. We would like to have them considered.

MR. CHAPIN: No objection, Your Honor.

MR. SAWATZKY: Now, we would like also the Court to take judicial notice of the interest rates applicable in these other five states, other than the State of Kansas. In Texas—

MR. CHAPIN: —Mr. Sawatzky, you don't have copies of the applicable interest laws?

MR. SAWATZKY: Well, I have some of them.

THE COURT: Let me make a suggestion other than what you are referring to at this moment. Do you have any other witnesses to offer?

MR. SAWATZKY: No, Your Honor.

THE COURT: All right, in order to clarify and state each parties' position I think I will ask in this case that each side submit their statement of facts and conclusions of law, which will help the Court in reaching a decision and perhaps you might incorporate those by way of either attached exhibits or by your own statement as to what your position is. Would that expedite things any?

* * *

* * * [44] open for reconsideration depending on the facts of this case, but more importantly the interest rates of the other states, we just don't think can be ignored. It would be not only a misapplication of law, but in our opinion a denial of due process and a violation of Federal Constitution principles involving the relations between the different states for one state to ignore the laws of the other state as to the matters for which that state is

entirely interested directly and entirely is merely a procedural forum by which a class action should result in certain relief and that relief should not exceed what those people understand their local law which is applicable. Thank you.

THE COURT: All right. I will wait for your memorandums.

MR. SAWATZKY: How much time can we have, about thirty days?

THE COURT: 30? Well, it's an old case, surely you know what your case is by now. Is that what it will take for you, Mr. Chapin?

MR. SAWATZKY: Well, Your Honor, I could work it over the weekend and probably have it in fifteen days, but I always like to have enough time so I don't have to ask for more.

THE COURT: All right, is that all right with you, thirty days?

* * *

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 1, TRIAL,
OCTOBER 13, 1983

EXHIBIT "1"

(SUNOCO)

North American Exploration
and Production Group
Production Division
Natural Gas Sales

SUN OIL COMPANY

Southland Center, Post Office Box 2880,
Dallas, Texas 75221 (214) 744-4411

Re: Federal Power Commission
Order No. 699-H
Replacement Contracts

To Royalty Owners:

As you are probably aware, the Federal Power Commission issued Opinion No. 699-H last year which set a National Rate for "new gas." It contained a provision to extend this rate to "old gas" covered by replacement contracts dated after January 1, 1973. Your recent royalty payments have been based upon gas prices covered by such a replacement contract.

Until now, Sun has paid royalties to you based on the new National Rate although Opinion No. 699-H is involved in litigation attempting to reduce this National Rate. Recently another suit has been filed challenging the specific applicability of the National Rate to replacement contracts dated after January 1, 1973.

In light of this recent suit, Sun will discontinue payment of royalty based upon the National Rate and instead will make royalty payments on the basis of the applicable rate previously approved by the Federal Power Commission. We will account to you fully for any sums which may be due you in the event the applicability of the National Rate to replacement contracts is finally upheld.

In the event the judicial proceedings result in the establishment of a lower rate than that upon which Sun has heretofore based its payments to you and we are required by the Federal Power Commission to refund any part of payments made to you in excess of the rate finally permitted, we will expect to recoup all amounts ordered to be refunded, on a reasonable basis.

Sun Oil Company (Delaware)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 2, TRIAL,
OCTOBER 13, 1983

EXHIBIT "2"

(SUNOCO)
SUN OIL COMPANY

Southland Center, Post Office Box 2880,
Dallas, Texas 75221 (214) 744-4411

December 8, 1976

To Royalty Owners:

Re: Federal Power Commission
Opinion No. 770-A

On July 27, 1976, the Federal Power Commission issued Opinion No. 770 establishing nationwide rates for "new gas." On the basis of the contentions set forth in applications for rehearing, and after further examination by the Commission, Opinion No. 770-A was issued November 5, 1976, clarifying and amending Opinion No. 770.

Appeals of this decision have been filed with the Third, Fifth, Ninth, Tenth and District of Columbia Circuit Courts of Appeal; therefore, neither the rates nor the categories of gas established in Opinion No. 770-A, will be finally determined until the settlement of court appeals.

In light of court review, Sun will continue to make payment of royalty based on the applicable rates previously approved by the Federal Power Commission. Sun will account to you fully for any additional sums which may be due you in the event the applicability of Opinion No. 770-A is finally upheld.

Very truly yours,

Sun Oil Company

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 3, TRIAL,
OCTOBER 13, 1983

EXHIBIT "3"

NOTICE TO INTEREST OWNERS

The enclosed check represents your interest in FERC (FPC) suspended proceeds from former Sunray DX properties, per various opinions and rulings, pending final approval. Closing date for period covered appears on the check. Since that date, royalties have been paid on prices set forth in the various opinions.

Sun Oil Company
Royalty Disbursements

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

er GAS STATEMENT

SUN OIL COMPANY (DELAWARE), P.O. Box 2880, DALLAS, TEXAS 75221

				QUANTITY	TRANS & OTHERS	TAX	NET VALUE	SOURCE INTEREST VALUE	SOURCE INTEREST
SUN GAS COMPANY A DIVISION OF SUN OIL COMPANY (DELAWARE)									
1170898516		180002					991.97	15.50	2 01562500

K DATE	OWNER NUMBER	CHECK NUMBER	1 OIL 2 GAS 3 CONDENSATE	1 WI 3 ORI 2 RI 4 PP	TOTAL	REGISTER
8-78	986030	4335424			15.50	4335424

(DENOTES DEDUCTION)

KEEP THIS STATEMENT FOR TAX PURPOSES. DUPLICATE WILL NOT BE FURNISHED. REFER TO PROPERTY NO. AND OWNER NO. WHEN WRITING.

FERC (FPC) OPINION NOS.

RATE SCHEDULE NOS

89

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 4, TRIAL,
OCTOBER 13, 1983
EXHIBIT "4"

Depo. - Dallas, Tex. 1-12-81

[4] MR. GEORGE WEHRMAKER,

having been first duly cautioned and sworn to testify the truth, the whole true and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CHAPIN:

Q. State your name, please.
A. George Wehrmaker.
Q. How do you spell that last name, please?
A. W-e-h-r-m-a-k-e-r (spelling).
Q. I take it you live in the Dallas area?
A. Yes, sir, I do.
Q. What is your occupation?
A. Controller for Sun Gas Company.
Q. Briefly, what are your duties as controller for Sun Gas?
A. I'm responsible for reporting financial results to Radner Corporation for—
Q. To whom?
A. Excuse me, Sun Company in Radner, financial results of Sun Gas Division; maintaining internal controls of the division; gathering of any other financial data that is requested by SEC or DOE purposes.

Q. Mr. Wehrmaker, you have handed me a copy of Sun Company's 1979 annual report. Referring to [5] that, where does Sun Gas Company's financial information show?

A. It doesn't; it's consolidated.

Q. How many companies are involved in this consolidated report for 1979?

A. I have no idea; a bunch.

Q. Are they listed on the back page of the report?

A. Those would be the major ones, but there are—Within that we have approximately 7 or 8 (/s/ G.W.) subsidiary companies in the Sun Gas module. And I know many of the other divisions or subsidiaries have similar or even more.

Q. Do you have a profit and loss statement and balance sheet for Sun Gas Company for 1979?

A. Yeah; yes, I do.

Q. Is it available? Could we see that?

A. I'm not at liberty to release that per corporate policy.

MR. PHELPS: That is unaudited.

A. It's unaudited. We are a division of Sun Delaware, and for release of that information you would have to get permission from the controller of Sun Company.

Q. Is there anything in this report you have [6] handed me specifically pertaining to Sun Gas Company?

A. Regarding their results of operations or—

Q. Right.

A. No, not that could be identified as Sun Gas Company.

Q. Is there anything specifically referring to Sun Oil and Sun Gas oil and gas operations?

A. Only in the back in the profile of the company, there is the oil and gas group.

Q. Where is that?

A. That is on this backfold-out section where you have the first column there; you have oil and gas group. That gives you the consolidated sales for the division of Sun Del.

Q. Let's refer to that then; sales and other operating income for the United States; what is that total figure for 1979?

A. That would be o . billion seven hundred and seventy one million sales and other operating income.

Q. And profit contribution before interest and after taxes for the United States; how much is that?

A. That is—For the United States would be three hundred and sixty-seven million.

Q. What is meant "profit contribution before interest and after taxes"?

[7] A. That would be—basically it would be net income as we understand it but they would exclude any intercompany interest that we would earn o1 our internal banking company, Claymont Investment Corporation.

Q. Next figure is profit contributions per share in dollars; how much is that for '79?

A. Six dollars and twenty-two cents per share; that is per Sun Company share.

Q. And do you know about what the market value of Sun Company shares was at the end of '79?

A. I don't think it's in here.

MR. SAWATZKY: On the market exchange, New York Stock Exchange?

A. The high for the fourth quarter was seventy-two and seven-eighths dollars per share.

Q. And what was the low?

A. The low in that fourth quarter was fifty-six dollars (/s/ G.W.) and three-eighths per share.

Q. Next figure is capital program United States; what is that figure?

A. That is three hundred and eighty-three million.

Q. For 1979?

A. For 1979.

[8] Q. That is capital surplus, reserves, and that sort of thing?

A. No, that would be your investment in fixed assets, basically; investments, acquisitions.

Q. Well, your next figure is assets, and how much is that?

A. That is two billion thirty-two million; this is for the United States.

Q. Right. How do you distinguish that from the capital program?

A. The capital program would be the amount invested in 1979. The asset figure would be the balance at the end of the year.

Q. That would be the total cumulative?

A. Cumulative, right.

Q. Now, we have been talking today and other employees have testified concerning FPC suspense moneys on gas royalties. Are you familiar with that term?

A. Yes.

Q. As Sun Gas received moneys, FPC suspense moneys, pursuant to Opinion 699, FPC Opinion 699, and pursuant to FPC Opinion 770, and any other applicable Opinion where they were suspended, how were those moneys handled? Were they handled like any other corporate money, put in the corporate treasury?

[9] A. I believe so, yes. That was back at—what period of time are you talking about?

Q. I'm talking about from '74 on up to date.

A. Currently that is what would happen today. I have only been at the gas company since June of 1978, so prior to that I really can't answer that question.

Q. As far as you know—

A. So far as I know, that would be the way it would be treated.

Q. The matter of suspense refers only to an accounting system, is that correct?

A. Yes.

Q. In other words, the money is not separated out and deposited in a separate bank account?

A. That's correct.

Q. Or separate investments of any kind?

A. That's correct.

Q. The money from FPC suspense gas was used then by Sun Gas Company just as any other cash or money?

A. I believe so, yes.

Q. Used to make a profit?

A. I hope so, yes.

MR. CHAPIN: That is all I have [10] of you. Thank you.

CROSS-EXAMINATION

BY MR. SAWATZKY:

Q. That generally was held as a liability on the books, was it not, anything subject to refund, up until the time of FPC Orders became final and final arrangements were made concerning that money?

A. Regarding the moneys, yes. We would have reported a liability. Our books would not have taken it into income on the income statement, yes, that's correct.

REDIRECT EXAMINATION

BY MR. CHAPIN:

Q. Well, it would also be reported as an asset as well as a liability, would it not?

A. Cash, yes.

Q. But you are saying it was not—Sun's part of it was not taken into account as profit? Is that what you are saying?

A. That's correct.

Q. Until the finality of the Opinion?

A. That's correct.

Q. Now, so far as the royalty owners' part or anyone other than Sun's part is concerned, that never would be a part of Sun's profit, would it?

[11] A. No.

Q. The money was subject to being refunded to the gas purchaser or paid out to others, isn't that right?

A. That's correct.

MR. CHAPIN: That is all. Thank you.

/s/ George Wehrmaker
George Wehrmaker

(Jurat Omitted in Printing)

Sun Company 1979

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

**PLAINTIFF'S EXHIBIT 5, TRIAL,
OCTOBER 13, 1983**

In 1979, employees of Sun Company produced goods and services amounting to $10.8 billion.

Sun's taxes were $716 million on these revenues.

Earnings totaled $700 million.

This is a report on how that happened.

Consolidated Statements of Income

SUN COMPANY, INC. AND CONSOLIDATED SUBSIDIARIES

For the Years Ended December 31	1979	1978*	1977*	1976*	1975*
(Millions of Dollars)					
Revenues					
Sales and Other Operating Income:					
Refined Products	$ 6,185.1	$ 4,400.8	$ 4,118.9	$ 3,624.5	$ 3,173.2
Crude and Condensate	84.7	206.3	204.0	118.2	206.0
Natural Gas	612.2	537.7	486.7	347.1	286.9
Coal and Coke	224.3	181.4	141.0	123.4	133.8
Resales of Purchased Oil	2,693.0	1,478.7	998.1	818.3	397.0
Related Products and Services and Other	833.4	534.8	477.1	317.3	224.4
Shipbuilding and Repair	33.3	153.9	11.4	82.3	44.0
	10,666.0	7,493.6	6,437.2	5,431.1	4,465.3
Other Income	134.8	99.2	87.8	64.0	45.2
	10,800.8	7,592.8	6,525.0	5,495.1	4,510.5
Costs and Expenses					
Costs and Operating Expenses	8,179.1	5,527.9	4,577.2	3,725.5	2,647.8
Selling, General and Administrative Expenses	634.3	522.8	451.6	371.9	358.5
Taxes, Other than Income Taxes (Note 3)	222.2	210.9	196.4	200.4	351.2
Depreciation, Cost Depletion, Amortization and Retirements	458.2	406.4	402.4	392.1	439.0
Interest and Debt Expense	122.3	89.5	72.7	67.1	67.2
Interest Capitalized	(9.2)	—	—	—	(2.8)
	9,606.9	6,757.5	5,700.3	4,757.0	3,860.9
Income Before Provision for Income Taxes	1,193.9	835.3	824.7	738.1	649.6
Provision for Income Taxes (Note 4):					
U.S. Federal — Current	236.3	216.6	238.1	207.8	77.5
Foreign and Other — Current	137.9	138.9	120.7	95.4	248.1
Deferred	119.8	65.1	54.2	3.9	81.5
	494.0	420.6	413.0	307.1	407.1
Net Income (Notes 1 and 2)	699.9	414.7	411.7	381.0	242.5
Less Dividend Requirements on Preferred Stock	8.4	13.0	24.7	36.1	36.5
Net Income Applicable to Common Stock	$ 691.5	$ 401.7	$ 387.0	$ 344.9	$ 206.0
**Net Income per Share of Common Stock:					
After Provision for Cash Dividends on Preferred Stock	$11.77	$7.08	$7.52	$7.08	$4.22
Assuming Full Conversion of Preferred Stock	$11.15	$6.60	$6.47	$5.81	$3.69
Weighted Average Number of Shares (Adjusted):					
Common Stock	58,748,784	56,708,881	51,437,438	48,706,227	48,788,754
Assuming Full Conversion of Preferred Stock	62,769,385	62,833,566	63,623,864	65,587,997	65,720,191
Cash Dividends Paid on Common Stock (Millions):					
Sun	$162.2	$140.9	$107.0	$70.4	$41.1
Pooled Company Prior to Combination (Note 1)	$2.0	$1.2	$.5	$.8	$1.0
**Cash Dividends per Share of Common Stock	$2.95	$2.73	$2.26	$1.61	$.94
**Dividends Paid per Share of Common Stock, Historical:					
Cash	$2.95	$2.73	$2.26	$1.61	$1.00
Stock	—	—	—	—	6%
**Stock Dividend Shares Distributed	—	—	—	—	2,472,349

*Reclassified to conform to the 1979 presentation.

**Net income per share of common stock is based on the weighted average number of shares outstanding during each year adjusted for a pooling of interests in 1979. Net income and cash dividends per share of common stock have been adjusted for a stock dividend in 1975. Dividends per share of common stock have not been adjusted for the pooling of interests described in Note 1.

(See Accompanying Notes)

Consolidated Balance Sheets

SUN COMPANY, INC. AND CONSOLIDATED SUBSIDIARIES

Assets *At December 31*	1979	1978
(Millions of Dollars)		
Current Assets		
Cash (including Time Deposits, and Certificates of Deposit of $386.6 in 1979 and $144.0 in 1978)	$ 453.0	$ 200.8
Short-Term Investments, at cost which approximates market	271.9	15.9
Accounts and Notes Receivable, net of allowances (Note 5)	884.4	783.5
Inventories (Note 6)	760.7	527.3
Total Current Assets	2,370.0	1,527.5
Long-Term Receivables and Investments (Note 7)	749.5	603.2
Properties, Plants and Equipment, net of accumulated depreciation, cost depletion and amortization of $3,110.4 in 1979 and $2,863.3 in 1978 (Note 8)	3,983.5	3,642.1
Deferred Charges and Other Assets (Note 9)	357.6	279.3
Total Assets	$7,460.6	$6,052.1
Liabilities and Stockholders' Equity *At December 31*		
Current Liabilities		
Accounts Payable	$1,307.0	$ 766.9
Accrued Liabilities	219.1	153.8
Notes Payable (Note 10)	12.1	18.0
Current Portion of Long-Term Debt (Note 11)	68.7	95.8
Taxes, Other than Income Taxes	87.2	73.3
Income Taxes	174.1	151.4
Total Current Liabilities	1,868.2	1,259.2
Indebtedness to Unconsolidated Subsidiaries	95.6	75.2
Long-Term Debt (Note 11)	765.5	696.4
Capitalized Lease Obligations (Note 12)	29.3	32.0
Deferred Income Taxes	627.4	481.3
Other Deferred Credits and Liabilities (Note 13)	304.7	271.5
Commitments and Contingent Liabilities (Note 14)		
Stockholders' Equity (Note 15)		
Preferred Stock, $2.25 cumulative convertible, par value $1 per share Authorized — 3,017,264 shares; Issued, 1979 — 3,017,060 shares (aggregate involuntary liquidation value $156.9); Issued, 1978 — 5,083,614 shares	3.0	5.1
Common Stock, par value $1 per share Authorized — 100,000,000 shares; Issued, 1979 — 60,028,829 shares; Issued, 1978 — 60,027,422 shares	60.0	60.0
Capital in Excess of Par Value	1,467.9	1,558.9
Earnings Employed in the Business	2,260.7	1,733.4
	3,791.6	3,357.4
Less Common Stock Held in Treasury, at cost 1979 — 501,649 shares; 1978 — 2,797,946 shares	21.7	120.9
Total Stockholders' Equity	3,769.9	3,236.5
Total Liabilities and Stockholders' Equity	$7,460.6	$6,052.1

The Company follows the Successful Efforts Method of Accounting for Oil and Gas Operations.

(See Accompanying Notes)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 7, TRIAL,
OCTOBER 13, 1983

EXHIBIT "7"

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of	)	Docket No. RI63-264
Sun Oil Company	)	

AGREEMENT AND UNDERTAKING OF SUN OIL COMPANY TO COMPLY WITH THE PROVISIONS OF SUBSECTION (C) OF SECTION 154.102 OF THE COMMISSION'S REGULATIONS UNDER THE NATURAL GAS ACT

Sun Oil Company is filing concurrently herewith a Motion Pursuant to Section 4(e) of the Natural Gas Act to make effective Supplement 3 to its FPC Gas Rate Schedule 94.

In conformity with the requirements of Section 154.102 of the Commission's Regulations Under the Natural Gas Act, Sun Oil Company hereby agrees and undertakes to comply with the provisions of subsection (c) of said section, insofar as it is applicable to the adjustment filed in this proceeding and has caused this agreement and undertaking to be executed and sealed in its name by its officers thereupon duly authorized in accordance with the terms

of the resolution of its Board of Directors, a certified copy of which is appended hereto this 23rd day of May 1963.

Sun Oil Company
By /s/ (Illegible)
Vice President

ATTEST:
/s/ (Illegible)
Secretary
Corporate Seal

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

PLAINTIFF'S EXHIBIT 8, TRIAL, OCTOBER 13, 1983

EXHIBIT "8"

CODE OF FEDERAL REGULATIONS

Conservation of Power and Water Resources

Revised as of April 1, 1981

§ 154.67 Suspended changes in rate schedules; motions to make effective at end of period of suspension; procedure.

(a) *Effect of suspended changes in rate schedules.* If a rate suspension proceeding initiated under section 4(e) of the Natural Gas Act has not been concluded and an order issued by the Commission at the expiration of the suspension period, the proposed change of rate, charge, classification, or service shall go into effect upon motion of the pipeline company proposing the change so long as the pipeline company complies with all requirements of this section. The proposed rate, charge, classification, or service shall become effective as of the date of receipt of such motion by the Commission or the expiration of the suspension period, whichever is later. Three copies of the motion shall be filed with the Commission.

(b) *Undertaking to comply.* (1) Concurrently with the motion to make the suspended rate effective, the company shall file an undertaking, described in paragraph (b)(2) of this section, to comply with the provisions of paragraphs (c) and (d) of this section. Three copies of the undertaking shall be filed with the Commission.

Unless notified to the contrary by the Secretary of the Commission within 30 days from the date of filing, such motion and undertaking shall be deemed to be satisfactory and to have been accepted for filing.

(2) The pipeline company shall file with the Secretary an undertaking to comply with the terms of this section. Such undertaking shall be signed by a responsible officer of the company, evidenced by proper authority from the Board of Directors, and accompanied by a certificate showing service of copies thereof upon the purchasers under the rate schedules to be made effective by the motion of the company, and shall conform to the model undertaking below:

AGREEMENT AND UNDERTAKING OF [COMPANY] TO COMPLY WITH THE TERMS AND CONDITIONS OF SECTION 154.67 OF THE COMMISSION'S RULES AND REGULATIONS UNDER THE NATURAL GAS ACT IN RESPECT TO [COMPANY'S] MOTION TO HAVE ITS PROPOSED TARIFF SHEETS IN DOCKET NO. RP PLACED INTO EFFECT

In conformity with the requirements of § 154.67 of the Commission's rules and regulations under the Natural Gas Act [Company], hereby agrees and undertakes to comply with the terms and conditions of said section of the Commission's rules and regulations and has caused this agreement and undertaking to be executed and sealed in its name by its officer(s) thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto this ..... day of ....., 19.....

By: [Company].

Attest: .....

(c) *Reports.* Any pipeline company whose proposed increased rates or charges were suspended and have gone into effect pending final order of the Commission pursuant to section 4(e) of the Natural Gas Act shall:

(1) Keep accurate account of all amounts received under the increased rates or charges which became effective after the suspension period, for each billing period, specifying by whom and in whose behalf such amounts are paid;

(2) Submit annually on or before April 30 of each year to the Commission, in writing (original and one copy) and under oath the following information concerning each billing period, for each purchaser for the previous calendar year:

(i) The monthly billing determinants of natural gas sold and transported to each purchaser under the suspended agreements or tariffs;

(ii) The revenues which would result from such sales if they were computed under the rates in effect immediately prior to the date the proposed increased rates or charges became effective;

(iii) The revenues resulting from such sales as computed under the proposed increased rates or charges that became effective after the suspension period; and

(iv) The difference between the revenues computed in paragraphs (c)(2)(ii) and (iii) of this section.

(3) The Director of the Office of Pipeline and Producer Regulation may require reports on a more frequent basis in individual cases when it is deemed appropriate and necessary to do so, or upon request where good cause is shown.

(d) *Refunds.* (1) Any pipeline company that collects rates or charges pursuant to this section shall refund at such time in such amounts and in such manner as may be required by final order of the Commission the portion of any increased rates or charges found by the Commission in that proceeding not to be justified, together with interest as required in paragraph (d)(2) of this section.

(2) Interest shall be computed from the date of collection until the date refunds are made as follows:

(i) At a rate of seven percent simple interest per annum on all excessive rates or charges held prior to October 10, 1974;

(ii) At a rate of nine percent simple interest per annum on all excessive rates or charges held between October 10, 1974 and September 30, 1979; and

(iii)(A) At an average prime rate for each calendar quarter on all excessive rates or charges held (including all interest applicable to such rates and charges) on or after October 1, 1979. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate values published in the Federal Reserve Bulletin, or in the Federal Reserve's "Selected Interest Rates" (Statistical Release G, 13), for the fourth, third, and second months preceding the first month of the calendar quarter.

(B) The interest required to be paid under paragraph (d)(2)(iii)(A) of this section shall be compounded quarterly.

(3) Any pipeline company required to make refunds pursuant to this section shall bear all costs of such refunding.

(4) Until the pipeline company makes the refunds as may be required by order of the Commission, the undertaking required by this section shall remain in full force and effect.

(Sec. 16, Natural Gas Act, 15 U.S.C. 7170; sec. 309, Federal Power Act, 16 U.S.C. 825h; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267)

[44 FR 53503, Sept. 14, 1979, as amended at 45 FR 3890, Jan. 21, 1980]

FEDERAL RESERVE

BULLETIN

Perspectives on the Food and Agricultural Situation

Monetary Policy, Money Supply

and the Federal Reserve's Operating Procedures

33 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective Date	Rate	Month	Average rate	Month	Average rate
1981—May 4	19.00	1981—Oct. 5	19.00	1980—July	11.48	1981 Apr.	17.15
11	19.50	13	18.00	Aug.	11.12	May	19.61
19	20.00	Nov. 3	17.50	Sept.	12.23	June	20.03
22	20.50	9	16.50–17.00	Oct.	13.79	July	20.39
June 3	20.00	17	17.00	Nov.	16.06	Aug.	20.50
July 6	20.50	20	16.50	Dec.	20.35	Sept.	20.08
Sept. 15	20.00	24	16.00	1981—Jan.	20.16	Oct.	18.45
22	19.50	Dec. 1	15.75	Feb.	19.43	Nov.	16.64
				Mar.	18.05	Dec.	15.75

34 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, November 2–7, 1981

Item	All sizes	Size of loan (in thousands of dollars) 1–24	25–49	50–99	100–499	500–999	1,000 and over
Short-Term Commercial and Industrial Loans							
1 Amount of loans (thousands of dollars)	$25,466,901	$853,739	$639,132	$579,473	$2,158,438	$814,291	$20,421,829
2 Number of loans	161,627	115,558	20,039	8,992	12,122	1,275	3,641
3 Weighted-average maturity (months)	1.6	3.0	2.8	3.9	3.4	3.0	1.2
4 Weighted-average interest rate (percent per annum)	17.23	19.95	19.19	19.65	19.13	18.64	16.73
5 Interquartile range[1]	16.14–18.06	18.25–21.55	18.25–20.85	18.27–21.15	18.25–20.22	17.50–19.65	15.99–17.30
Percentage of amount of loans							
6 With floating rate	33.5	27.9	48.2	56.5	57.0	72.1	31.1
7 Made under commitment	48.1	31.3	35.9	35.8	45.9	71.9	48.8
8 With no stated maturity	15.9	10.1	15.3	17.1	19.9	35.2	15.0
Long-Term Commercial and Industrial Loans							
9 Amount of loans (thousands of dollars)	$2,438,209		$317,491		$688,960	$205,534	$1,226,234
10 Number of loans	27,160		23,639		2,811	319	391
11 Weighted-average maturity (months)	37.6		29.4		34.0	37.1	41.8
12 Weighted-average interest rate (percent per annum)	18.94		19.60		21.22	18.52	17.55
13 Interquartile range[1]	17.50–19.56		18.00–20.50		18.00–20.50	17.50–19.75	16.72–18.90
Percentage of amount of loans							
14 With floating rate	56.3		48.0		33.1	85.6	66.6
15 Made under commitment	54.1		36.3		27.2	69.5	71.2
Construction and Land Development Loans							
16 Amount of loans (thousands of dollars)	$1,420,394	$155,847	$192,683	$187,702	$425,106	$459,056	
17 Number of loans	23,437	12,668	5,497	2,616	2,406	250	
18 Weighted-average maturity (months)	9.9	7.6	9.9	5.7	11.5	11.1	
19 Weighted-average interest rate (percent per annum)	19.46	19.86	19.60	20.43	20.03	18.34	
20 Interquartile range[1]	18.54–20.75	19.00–21.00	18.77–19.90	18.50–21.74	19.56–20.82	17.12–19.90	
Percentage of amount of loans							
21 With floating rate	55.3	17.6	21.2	45.2	48.5	92.8	
22 Secured by real estate	82.4	95.9	98.5	98.9	78.9	67.5	
23 Made under commitment	38.5	16.4	11.6	16.8	28.2	75.6	
24 With no stated maturity	10.2	3.6	2.3	4.3	4.3	23.7	
Type of construction							
25 1- to 4-family	45.8	79.6	55.2	63.4	57.3	12.6	
26 Multifamily	5.0	1.2	1.6	2.8	3.7	9.8	
27 Nonresidential	49.2	19.1	43.2	33.8	39.0	77.7	

	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
Loans to Farmers							
28 Amount of loans (thousands of dollars)	$1,260,648	$156,504	$179,965	$197,569	$162,025	$301,038	$263,546
29 Number of loans	64,345	41,247	12,442	5,909	2,448	1,919	380
30 Weighted-average maturity (months)	5.8	5.8	7.3	5.5	5.7	5.6	4.9
31 Weighted-average interest rate (percent per annum)	18.76	18.52	18.79	18.59	18.40	19.04	18.93
32 Interquartile range[1]	17.72–19.56	17.72–19.44	17.72–19.54	17.72–19.36	17.72–19.06	18.10–20.12	18.00–20.15
By purpose of loan							
33 Feeder livestock	18.50	18.56	18.19	18.35	18.41	18.14	19.10
34 Other livestock	18.66	18.23	19.50	18.77	15.05	*	*
35 Other current operating expenses	18.88	18.67	19.04	18.74	18.47	19.20	19.11
36 Farm machinery and equipment	18.11	18.00	17.94	17.98	*	*	*
37 Other	18.87	18.68	19.13	19.31	18.28	19.03	18.63

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans.

NOTE. For more detail, see the Board's E.2(111) statistical release.

1.33 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective Date	Rate	Month	Average rate	Month	Average rate
1981—May 19	20.00	1981—Nov. 3	17.50	1980—Oct.	13.79	1981—July	20.39
22	20.50	9	17.00	Nov.	16.06	Aug.	20.50
June 3	20.00		16.50–	Dec.	20.35	Sept.	20.08
July 8	20.50	17	17.00			Oct.	18.45
Sept. 15	20.00	20	16.50	1981—Jan.	20.16	Nov.	16.84
22	19.50	24	16.00	Feb.	19.43	Dec.	15.75
Oct. 5	19.00	Dec. 1	15.75	Mar.	18.05		
13	18.09			Apr.	17.15	1982—Jan.	15.75
		1982—Feb. 2	16.50	May	19.61		
				June	20.03		

1.34 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, November 2–7, 1981

Item	All sizes	Size of loan (in thousands of dollars)					
		1–24	25–49	50–99	100–499	500–999	1,000 and over
SHORT-TERM COMMERCIAL AND INDUSTRIAL LOANS							
1 Amount of loans (thousands of dollars)	$25,466,901	$853,739	$639,132	$579,473	$2,158,438	$814,291	$20,421,829
2 Number of loans	161,627	115,558	20,039	8,992	12,122	1,275	3,641
3 Weighted-average maturity (months)	1.6	3.0	2.8	3.9	3.4	3.0	1.2
4 Weighted-average interest rate (percent per annum)	17.23	19.95	19.19	19.65	19.13	18.64	16.73
5 Interquartile range[1]	16.14–18.06	18.25–21.55	18.25–20.85	18.27–21.15	18.25–20.22	17.50–19.65	15.99–17.30
Percentage of amount of loans							
6 With floating rate	35.5	27.9	48.2	56.5	57.0	72.1	31.1
7 Made under commitment	48.1	31.3	35.9	35.8	45.9	71.9	48.8
8 With no stated maturity	15.9	10.1	15.3	17.1	19.9	35.2	15.0
LONG-TERM COMMERCIAL AND INDUSTRIAL LOANS							
9 Amount of loans (thousands of dollars)	$2,438,209	←	$317,491	→	$688,950	$205,534	$1,226,234
10 Number of loans	27,160		23,639		2,811	319	391
11 Weighted-average maturity (months)	37.6		29.4		34.0	37.1	41.8
12 Weighted-average interest rate (percent per annum)	18.94		19.60		21.22	18.52	17.55
13 Interquartile range[1]	17.50–19.56		18.00–20.50		18.00–20.50	17.50–19.75	16.72–18.90
Percentage of amount of loans							
14 With floating rate	56.3		48.0		33.1	85.6	66.6
15 Made under commitment	54.1		36.3		27.2	69.5	71.2
CONSTRUCTION AND LAND DEVELOPMENT LOANS							
16 Amount of loans (thousands of dollars)	$1,420,394	$155,847	$192,683	$187,702	$425,106	← $459,056 →	
17 Number of loans	23,437	12,668	5,497	2,616	2,406	250	
18 Weighted-average maturity (months)	9.9	7.6	9.9	5.7	11.5	11.1	
19 Weighted-average interest rate (percent per annum)	19.46	19.86	19.60	20.43	20.03	18.34	
20 Interquartile range[1]	18.54–20.75	19.00–21.00	18.77–19.90	18.50–21.74	19.56–20.82	17.12–19.90	
Percentage of amount of loans							
21 With floating rate	55.3	17.6	21.2	45.2	48.5	92.8	
22 Secured by real estate	82.4	95.9	98.5	98.9	78.9	67.5	
23 Made under commitment	38.5	16.4	11.6	16.8	28.2	75.6	
24 With no stated maturity	10.2	3.6	2.3	4.3	4.3	23.7	
Type of construction							
25 1- to 4-family	45.8	79.6	55.2	63.4	57.3	12.6	
26 Multifamily	5.0	1.2	1.6	2.8	3.7	9.8	
27 Nonresidential	49.2	19.1	43.2	33.8	39.0	77.7	
LOANS TO FARMERS	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
28 Amount of loans (thousands of dollars)	$1,260,648	$156,504	$179,965	$197,569	$162,025	$301,038	$263,546
29 Number of loans	64,345	41,247	12,442	5,909	2,448	1,919	360
30 Weighted-average maturity (months)	5.8	5.8	7.3	5.5	5.7	5.6	4.9
31 Weighted-average interest rate (percent per annum)	18.76	18.52	18.79	18.59	18.40	19.04	18.93
32 Interquartile range[1]	17.72–19.56	17.72–19.44	17.72–19.54	17.72–19.36	17.72–19.06	18.10–20.12	18.00–20.15
By purpose of loan							
33 Feeder livestock	18.50	18.56	18.19	18.35	18.41	18.14	19.10
34 Other livestock	18.66	18.23	19.50	18.77	18.05	*	*
35 Other current operating expenses	18.88	18.67	19.04	18.74	18.47	19.20	19.11
36 Farm machinery and equipment	18.11	18.00	17.94	17.98	*	*	*
37 Other	18.87	18.68	19.13	19.31	18.28	19.03	18.63

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans

NOTE. For more detail, see the Board's E.2(111) statistical release.

1.33 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective Date	Rate	Month	Average rate	Month	Average rate
1981—May 19	20.00	1981—Nov. 3	17.50	1980—Oct.	13.79	1981—July	20.39
22	20.50	9	17.00	Nov.	16.06	Aug.	20.50
June 3	20.00		16.50-	Dec.	20.35	Sept.	20.08
July 8	20.50	17	17.00			Oct.	18.45
Sept. 15	20.00	20	16.50	1981—Jan.	20.16	Nov.	16.84
22	19.50	24	16.00	Feb.	19.43	Dec.	15.75
Oct. 5	19.00	Dec. 1	15.75	Mar.	18.05		
13	18.00			Apr.	17.15	1982—Jan.	15.75
		1982—Feb. 2	16.50	May	19.61	Feb.	16.56
		Feb. 18	17.00	June	20.03		
		Feb. 23	16.50				

1.34 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, November 2-7, 1981

Item	All sizes	Size of loan (in thousands of dollars)					
		1–24	25–49	50–99	100–499	500–999	1,000 and over
Short-Term Commercial and Industrial Loans							
1 Amount of loans (thousands of dollars)	$25,466,901	$853,739	$639,132	$579,473	$2,156,436	$814,291	$20,421,829
2 Number of loans	151,627	115,558	20,039	8,992	12,122	1,275	3,641
3 Weighted-average maturity (months)	1.6	3.0	2.8	3.9	3.4	3.0	1.2
4 Weighted-average interest rate (percent per annum)	17.23	19.95	19.19	19.65	19.13	18.64	16.73
5 Interquartile range[1]	16.14–18.06	18.25–21.55	18.25–20.85	18.27–21.15	18.25–20.22	17.50–19.65	15.99–17.30
Percentage of amount of loans							
6 With floating rate	35.5	27.9	48.2	56.5	57.0	72.1	31.1
7 Made under commitment	48.1	31.3	35.9	35.8	45.9	71.9	48.8
8 With no stated maturity	15.9	10.1	15.3	17.1	19.9	35.2	15.0
Long-Term Commercial and Industrial Loans							
9 Amount of loans (thousands of dollars)	$2,438,209	$317,491		$688,950	$205,534	$1,226,234	
10 Number of loans	27,160	23,639		2,811	319	391	
11 Weighted-average maturity (months)	37.6	29.4		34.0	37.1	41.8	
12 Weighted-average interest rate (percent per annum)	18.94	19.60		21.22	18.52	17.55	
13 Interquartile range[1]	17.50–19.56	18.00–20.50		18.00–20.50	17.50–19.75	16.72–18.90	
Percentage of amount of loans							
14 With floating rate	56.3	48.0		33.1	85.6	66.6	
15 Made under commitment	54.1	36.3		27.2	69.5	71.3	
Construction and Land Development Loans							
16 Amount of loans (thousands of dollars)	$1,420,394	$155,847	$192,683	$187,702	$425,106	$459,056	
17 Number of loans	23,437	12,668	5,497	2,616	2,406	250	
18 Weighted-average maturity (months)	9.9	7.6	9.9	5.7	11.5	11.1	
19 Weighted-average interest rate (percent per annum)	19.46	19.86	19.60	20.43	20.03	18.34	
20 Interquartile range[1]	18.54–20.75	19.00–21.00	18.77–19.90	18.50–21.74	19.56–20.82	17.12–19.90	
Percentage of amount of loans							
21 With floating rate	55.3	17.6	21.2	45.2	48.5	92.8	
22 Secured by real estate	82.4	95.9	98.5	98.9	78.9	67.5	
23 Made under commitment	38.5	16.4	11.6	16.8	28.2	75.6	
24 With no stated maturity	10.2	3.6	2.3	4.3	4.3	23.7	
Type of construction							
25 1- to 4-family	45.8	79.6	55.2	63.4	57.3	12.6	
26 Multifamily	5.0	1.2	1.6	2.8	3.7	9.8	
27 Nonresidential	49.2	19.1	43.2	33.8	39.0	77.7	
	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
Loans to Farmers							
28 Amount of loans (thousands of dollars)	$1,260,648	$156,504	$179,965	$197,569	$162,025	$301,038	$263,547
29 Number of loans	64,345	41,247	12,442	5,909	2,448	1,919	380
30 Weighted-average maturity (months)	5.8	5.8	7.3	5.5	5.7	5.6	4.9
31 Weighted-average interest rate (percent per annum)	18.76	18.52	18.79	18.59	18.40	19.04	18.9
32 Interquartile range[1]	17.72–19.56	17.72–19.44	17.72–19.54	17.72–19.36	17.72–19.06	18.10–20.12	18.00–20.1
By purpose of loan							
33 Feeder livestock	18.50	18.56	18.19	18.35	18.41	18.14	19.1
34 Other livestock	18.66	18.23	19.50	18.77	18.05	[2]	[2]
35 Other current operating expenses	18.88	18.67	19.04	18.74	18.47	19.20	19.1
36 Farm machinery and equipment	18.11	18.00	17.94	17.98	[2]	[2]	[2]
37 Other	18.87	18.68	19.13	19.31	18.28	19.03	18.6

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans

NOTE. For more detail, see the Board's E.2(111) statistical release.

1.33 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective Date	Rate	Month	Average rate	Month	Average rate
1980—Sept. 19	12.50	1980—Dec. 2	18.50	1979—Sept.	12.90	1980—May	16.57
26	13.00	5	19.00	Oct.	14.39	June	12.63
Oct. 1	13.50	10	20.00	Nov.	15.55	July	11.48
17	14.00	16	21.00	Dec.	15.30	Aug.	11.12
29	14.50	19	21.50			Sept.	12.23
Nov. 6	15.50			1980—Jan.	15.25	Oct.	13.79
17	16.25	1981—Jan. 2	20.50	Feb.	15.63	Nov.	16.06
21	17.00			Mar.	18.31	Dec.	20.35
26	17.75			Apr.	19.77		

1.34 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, November 3–8, 1980

Item	All sizes	Size of loan (in thousands of dollars)					
		1–24	25–49	50–99	100–499	500–999	1,000 and over
Short-Term Commercial and Industrial Loans							
1 Amount of loans (thousands of dollars)	13,108,722	729,247	549,089	562,389	1,819,646	665,483	8,774,868
2 Number of loans	131,579	92,779	16,539	9,235	10,024	1,049	1,953
3 Weighted-average maturity (months)	2.2	3.0	3.5	2.9	3.0	3.4	1.7
4 Weighted-average interest rate (percent per annum)	15.71	15.97	15.72	16.39	15.52	15.87	15.68
5 Interquartile range[1]	15.12–16.65	14.75–17.23	13.52–17.11	15.50–17.50	14.50–16.75	15.31–16.61	15.25–16.50
Percentage of amount of loans							
6 With floating rate	50.5	25.0	27.9	40.7	52.1	68.3	53.0
7 Made under commitment	45.7	25.1	22.3	35.3	46.4	65.6	48.0
8 With no stated maturity	25.2	14.9	12.0	17.4	24.3	31.0	27.1
Long-Term Commercial and Industrial Loans							
9 Amount of loans (thousands of dollars)	3,152,110	306,233			571,615	171,411	2,102,851
10 Number of loans	17,989	15,060			2,245	245	439
11 Weighted-average maturity (months)	46.3	48.3			34.4	40.6	49.6
12 Weighted-average interest rate (percent per annum)	15.07	15.42			15.29	15.20	14.95
13 Interquartile range[1]	14.50–15.62	14.93–16.65			14.75–15.50	14.50–16.25	14.50–15.50
Percentage of amount of loans							
14 With floating rate	70.1	39.3			29.5	72.3	85.5
15 Made under commitment	58.1	29.0			25.1	70.2	70.3
Construction and Land Development Loans							
16 Amount of loans (thousands of dollars)	1,072,203	105,341	242,030	167,557	230,726	326,549	
17 Number of loans	24,383	13,527	6,586	2,637	1,413	221	
18 Weighted-average maturity (months)	13.4	9.4	5.0	19.4	10.0	18.0	
19 Weighted-average interest rate (percent per annum)	15.31	15.23	14.64	14.74	15.24	16.16	
20 Interquartile range[1]	14.00–16.65	14.04–16.99	13.10–15.50	14.00–14.75	14.00–17.00	15.50–17.00	
Percentage of amount of loans							
21 With floating rate	44.4	22.7	8.8	45.6	47.9	74.7	
22 Secured by real estate	81.9	84.3	98.2	96.7	89.8	56.0	
23 Made under commitment	60.9	48.7	60.9	21.5	78.2	73.0	
24 With no stated maturity	16.5	4.9	26.9	3.1	35.8	5.8	
Type of construction							
25 1- to 4-family	40.9	75.0	66.9	57.7	24.9	13.3	
26 Multifamily[2]	8.2	[illegible]	[illegible]	[illegible]	8.9	10.7	
27 Nonresidential	50.9	22.7	23.1	36.7	66.2	76.0	

Item	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
Loans to Farmers							
28 Amount of loans (thousands of dollars)	1,301,641	191,079	217,452	190,952	196,075	275,324	230,759
29 Number of loans	72,123	46,721	14,605	5,800	2,838	1,789	370
30 Weighted-average maturity (months)	7.3	6.7	7.1	5.6	6.6	10.6	5.8
31 Weighted-average interest rate (percent per annum)	15.46	15.10	15.02	15.22	15.55	15.74	15.98
32 Interquartile range[1]	14.49–16.64	14.30–15.97	14.32–15.95	14.04–16.21	15.00–16.10	14.48–16.64	14.93–17.0
By purpose of loan							
33 Feeder livestock	15.45	15.10	15.09	14.93	15.23	15.79	16.3
34 Other livestock	15.35	15.19	15.96	14.84	15.46	15.30	(2)
35 Other current operating expenses	15.44	15.17	15.14	15.33	15.88	15.97	15.21
36 Farm machinery and equipment	15.13	15.01	14.81	15.44	15.42	(2)	(2)
37 Other	15.75	14.91	13.90	16.06	15.79	15.44	17.25

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans.

NOTE. For more detail, see the Board's E.2(416) statistical release.

1.33 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective Date	Rate	Month	Average rate	Month	Average rate
1980—Dec. 10	20.00	1981—Mar. 17	17.50	1980—Apr.	19.77	1981—Jan.	20.16
16	21.00	Apr. 2	17.00	May	16.57	Feb.	19.43
19	21.50	24	17.50	June	12.63	Mar.	18.05
		30	18.00	July	11.48	Apr.	17.15
1981—Jan. 2	20.50	May 4	19.00	Aug.	11.12	May	19.61
9	20.00	11	19.50	Sept.	12.23	June	20.03
Feb. 3	19.50	19	20.00	Oct.	13.79		
23	19.00	22	20.50	Nov.	16.06		
Mar. 10	18.00	June 3	20.00	Dec.	20.35		

1.34 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, May 4–9, 1981

Item	All sizes	Size of loan (in thousands of dollars)					
		1–24	25–49	50–99	100–499	500–999	1,000 and over
SHORT-TERM COMMERCIAL AND INDUSTRIAL LOANS							
1 Amount of loans (thousands of dollars)	16,840,794	853,190	481,971	767,519	2,118,788	1,041,775	11,577,551
2 Number of loans	164,452	121,015	14,694	12,003	12,686	1,706	2,346
3 Weighted-average maturity (months)	2.0	3.1	3.8	3.5	3.2	3.3	1.4
4 Weighted-average interest rate (percent per annum)	19.99	19.45	19.87	19.10	19.93	19.58	20.14
5 Interquartile range[1]	19.00–20.85	17.85–21.15	18.83–21.74	17.00–21.00	18.95–21.49	18.39–20.75	19.36–20.85
Percentage of amount of loans							
6 With floating rate	49.0	30.1	41.2	43.2	64.7	60.7	47.2
7 Made under commitment	52.8	24.6	33.1	48.1	49.1	56.7	56.4
8 With no stated maturity	21.6	13.4	12.6	21.4	20.7	29.5	22.0
LONG-TERM COMMERCIAL AND INDUSTRIAL LOANS							
9 Amount of loans (thousands of dollars)	3,633,958		280,677		450,944	175,691	2,726,645
10 Number of loans	21,441		17,936		2,725	277	503
11 Weighted-average maturity (months)	50.6		35.4		53.1	43.8	52.2
12 Weighted-average interest rate (percent per annum)	19.25		19.22		19.34	19.48	19.23
13 Interquartile range[1]	19.00–20.00		17.87–21.34		18.68–20.16	19.00–20.74	19.00–19.76
Percentage of amount of loans							
14 With floating rate	78.6		49.5		68.4	87.1	82.7
15 Made under commitment	77.2		25.7		34.6	78.0	89.5
CONSTRUCTION AND LAND DEVELOPMENT LOANS							
16 Amount of loans (thousands of dollars)	874,542	74,010	81,222	169,763	223,133	326,415	
17 Number of loans	13,956	7,690	2,363	2,333	1,332	237	
18 Weighted-average maturity (months)	13.2	3.3	4.1	17.7	12.0	16.1	
19 Weighted-average interest rate (percent per annum)	19.09	19.83	19.06	16.10	20.74	19.35	
20 Interquartile range[1]	18.00–21.94	18.00–21.91	15.00–21.74	8.25–18.40	20.40–22.54	19.00–21.55	
Percentage of amount of loans							
21 With floating rate	66.3	58.5	42.3	19.4	83.2	87.0	
22 Secured by real estate	93.1	93.3	85.5	97.9	92.4	93.0	
23 Made under commitment	64.8	63.5	62.3	19.8	80.9	78.1	
24 With no stated maturity	10.5	20.6	5.2	4.7	4.0	17.0	
Type of construction							
25 1- to 4-family	32.3	64.1	85.5	12.5	24.0	27.7	
26 Multifamily	13.1	2.9	3.3	3.0	10.1	25.2	
27 Nonresidential	54.7	33.0	11.2	84.5	65.9	47.2	

	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
LOANS TO FARMERS							
28 Amount of loans (thousands of dollars)	1,419,090	188,183	236,302	220,646	180,935	281,187	311,838
29 Number of loans	77,593	50,065	15,850	6,450	2,740	1,957	531
30 Weighted-average maturity (months)	6.8	6.8	6.4	6.6	6.3	7.7	6.8
31 Weighted-average interest rate (percent per annum)	17.88	17.50	17.59	17.67	17.78	17.97	18.46
32 Interquartile range[1]	16.53–19.10	16.64–18.68	16.64–18.81	16.64–18.50	16.64–18.50	16.53–18.77	16.10–20.75
By purpose of loan							
33 Feeder livestock	18.44	17.98	18.43	17.91	18.07	18.49	18.93
34 Other livestock	17.98	17.28	18.42	17.39	18.75	17.64	(2)
35 Other current operating expenses	17.73	17.46	17.36	17.65	17.88	18.27	17.85
36 Farm machinery and equipment	17.61	17.53	17.62	17.63	17.01	(2)	(2)
37 Other	17.68	17.30	17.25	17.58	17.22	17.35	19.73

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans.

NOTE. For more detail, see the Board's E.2(111) statistical release.

1.34 PRIME RATE CHARGED BY BANKS on Short-Term Business Loans

Percent per annum

Effective date	Rate	Effective date	Rate	Month	Average rate	Month	Average rate
1979—June 19	11½	1979—Oct. 9	14½	1979—Jan.	11.75	1979—July	11.54
July 27	11¾	23	15	Feb.	11.75	Aug.	11.91
Aug. 16	12	Nov. 1	15¼	Mar.	11.75	Sept.	12.90
28	12¼	9	15½	Apr.	11.75	Oct.	14.39
Sept. 7	12¾	16	15¾	May	11.75	Nov.	15.55
14	13	30	15½	June	11.65	Dec.	15.30
21	13¼	Dec. 7	15¼				
28	13½						

1.35 TERMS OF LENDING AT COMMERCIAL BANKS Survey of Loans Made, November 5–10, 1979▲

Item	All sizes	Size of loan (in thousands of dollars)					
		1–24	25–49	50–99	100–499	500–999	1,000 and over
SHORT-TERM COMMERCIAL AND INDUSTRIAL LOANS							
1 Amount of loans (thousands of dollars)	8,046,052	689,179	365,934	428,441	1,707,259	678,635	4,176,594
2 Number of loans	126,938	96,306	11,074	6,926	10,261	1,052	1,320
3 Weighted average maturity (months)	3.0	3.6	3.3	3.3	3.5	3.9	2.5
4 Weighted average interest rate (percent per annum)	15.81	14.77	14.92	15.93	15.41	16.02	16.19
5 Interquartile range[1]	15.25–16.82	12.68–16.99	13.23–16.87	14.58–17.48	13.65–16.91	15.25–16.86	15.31–16.70
Percentage of amount of loans							
6 With floating rate	32.6	17.1	21.7	44.6	36.5	66.6	66.3
7 Made under commitment	49.4	19.7	26.2	38.4	43.6	61.1	58.0
LONG-TERM COMMERCIAL AND INDUSTRIAL LOANS							
8 Amount of loans (thousands of dollars)	1,636,882	322,465			203,211	136,801	974,405
9 Number of loans	28,486	27,023			1,015	266	247
10 Weighted average maturity (months)	48.5	35.0			39.0	35.6	56.8
11 Weighted average interest rate (percent per annum)	15.56	14.78			15.66	15.43	15.81
12 Interquartile range[1]	15.25–16.50	13.00–16.19			15.00–17.23	15.25–17.00	15.25–16.25
Percentage of amount of loans							
13 With floating rate	71.8	27.9			66.4	74.0	87.1
14 Made under commitment	63.3	33.3			60.3	62.0	74.1
CONSTRUCTION AND LAND DEVELOPMENT LOANS							
15 Amount of loans (thousands of dollars)	1,050,513	204,258	194,619	144,341	274,856	232,439	
16 Number of loans	34,460	25,154	5,311	2,256	1,562	177	
17 Weighted average maturity (months)	9.7	7.9	18.5	6.3	7.4	9.1	
18 Weighted average interest rate (percent per annum)	15.51	14.21	15.73	15.72	15.83	15.97	
19 Interquartile range[1]	14.49–17.25	11.85–16.31	14.58–17.21	13.72–16.99	14.58–17.61	15.69–17.50	
Percentage of amount of loans							
20 With floating rate	40.2	16.2	12.8	29.6	58.1	69.8	
21 Secured by real estate	77.0	70.4	66.1	61.4	91.0	85.2	
22 Made under commitment	40.5	31.4	26.5	31.3	53.0	51.1	
Type of construction							
23 1- to 4-family	38.8	58.6	49.6	20.5	44.2	17.3	
24 Multifamily	7.4	1.3	1.5	4.8	10.8	15.1	
25 Nonresidential	53.8	40.1	48.8	74.8	44.9	67.5	
LOANS TO FARMERS	All sizes	1–9	10–24	25–49	50–99	100–249	250 and over
26 Amount of loans (thousands of dollars)	1,192,740	160,093	184,178	181,278	234,279	247,826	185,086
27 Number of loans	65,857	42,436	12,814	4,926	3,604	1,670	408
28 Weighted average maturity (months)	6.9	7.3	7.1	7.0	7.3	5.8	7.3
29 Weighted average interest rate (percent per annum)	13.63	12.91	13.20	13.32	13.11	13.86	15.31
30 Interquartile range[1]	12.42–14.49	11.83–13.80	11.72–14.32	12.00–14.41	12.00–14.00	13.42–13.80	13.42–17.51
By purpose of loan							
31 Feeder livestock	13.51	12.03	13.20	12.87	13.44	13.45	14.62
32 Other livestock	12.91	12.16	12.55	14.19	11.57	[2]	[2]
33 Other current operating expenses	13.65	13.09	13.28	13.81	12.96	15.45	15.20
34 Farm machinery and equipment	13.16	13.03	13.75	13.53	12.09	[2]	[2]
35 Other	14.53	13.38	12.92	13.30	14.15	14.21	16.76

1. Interest rate range that covers the middle 50 percent of the total dollar amount of loans made.
2. Fewer than 10 sample loans.

NOTE. For more detail, see the Board's E.2(416) statistical release.
▲ These data are preliminary; final figures will appear in the February BULLETIN.

FPC OPINION NUMBER	NO. OF PROPERTIES UNDER EACH OPINION, BY STATE	PERCENT OF TOTAL PROPERTIES BY STATE
586	Ks. - 45 Ok. - 378 Tx. - 65 Total 488	Ks. - 9.2% Ok. - 77.5% Tx. - 13.3%
699/699H	Ks. - 14 Ok. - 161 Tx. - 293 La. - 153 Ms. - 23 N.M.- 26 Total 670	Ks. - 2.1% Ok. - 24 % Tx. - 43.7% La. - 22.8% Ms. - 3.4% N.M.- 3.9%
749	Ks. - 43 Ok. - 422 Tx. - 554 La. - 159 Ms. - 19 N.M.- 36 Total 1,233	Ks. - 3.5% Ok. - 34.2% Tx. - 44.9% La. - 12.9% Ms. - 1.5% N.M.- 2.9%
770/770A	Ks. - 2 Ok. - 218 Tx. - 278 La. - 163 Ms. - 6 N.M.- 23 Total 690	Ks. - .3% Ok. - 31.6% Tx. - 40.3% La. - 23.6% Ms. - .9% N.M.- 3.3%

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

DEFENDANT'S EXHIBIT A, TRIAL,
OCTOBER 13, 1983

SCHEDULE OF SUSPENSE PAYMENTS

NO. OF KS. RESIDENTS RECEIVING SUSPENSE PAYMENTS	TOTAL OF ALL SUSPENSE PAYMENTS IN ALL STATES	SUSPENSE PAYMENTS TO KS. RESIDENTS	% OF TOTAL SUSPENSE $ PAID TO KS. RESIDENTS	GAS PURCHASES OF SUN OIL COMPANY, (DELAWARE), BY STATE
	$470,223.05 (Only $13,000 since 1973)			Ks. - .281% Ok. - 13.671% Tx. - 46.255% La. - 28.008% Ms. - 1.560% N.M. - 6.270% Others - 4.062%
7 (981 interest holders received payment nationwide; Seven-tenths of one percent were thus Kansas residents.)	$1,167,000	$763.48	Six Hundredths of one per cent	
0	$0	$0		
14 (1,353 interest holders received payment nationwide, one percent were thus Kansas residents.)	$2,676,000	$12,932.13	Less than Five tenths of one percent	

(Filed December 13, 1983)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,	)	Case No. 79C40
Plaintiffs,	)	
-vs-	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

MEMORANDUM DECISION

Judgement for the plaintiff is hereby rendered in accordance with the following findings of fact and conclusions of law on this 12 day of December, 1983.

FINDINGS OF FACT

The plaintiffs in this action are Richard Wortman, who is a gas royalty owner under a Kansas oil and gas lease to whom Sun accounts for his gas royalties, and Hazel Moore, who is a gas royalty owner under an Oklahoma oil and gas lease to whom Sun accounts for her gas royalties. Both appear individually and as representatives of a class of persons defined as follows:

> "All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of

suspended royalties after August 23, 1974, through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 770A."

Plaintiffs will hereinafter, either individually or as representatives of a class, be referred to as "Wortman". The defendant is Sun Oil Company, hereinafter referred to as "Sun".

This class action against Sun seeks to recover interest on additional or suspense gas royalties paid by Sun at various times from and after August 23, 1974, relating to the above mentioned FPC and FERC Opinions, to its royalty owners and overriding royalty owners subsequent to approval by FPC and FERC and the courts of certain proposed rate increases on gas sales in the six states of the United States, where Sun is engaged in producing natural gas.

Both Wortman and Moore have received royalties previously suspended pursuant to one or more of the above mentioned FPC or FERC Opinions.

Sun did not pay any interest on the suspended royalties which were eventually paid to the plaintiffs and the plaintiff class pursuant to the above mentioned FPC and FERC Opinions.

Opinion No. 586 involves only the Hugoton-Anadarko area as defined by FPC and which consists of all of the State of Kansas and parts of the States of Oklahoma and Texas.

Beginning with Opinion 699, the FERC eliminated the area by area pricing scheme it had been employing and established a nation-wide rate for qualified gas. Additionally, Opinions 699, 699H, 700 and 700A set certain

rates governing the sale of natural gas in interstate commerce. During the pendency of subsequent administrative and court appeals involving these opinions, Sun began receiving money at the increased rates set forth in these opinions but did not pay the increase out to its royalty owners.

Through the use of notice slips accompanying regular royalty checks, Sun informed the royalty owners that until final approval of the various opinions, payment of the increased proceeds would be suspended. Copies of such notices are attached, marked Exhibit 1-3.

Under Opinion 586, there were 4,727 interests paid $470,223.05; but it is believed that only about $13,000.00 has been paid since 1973, this money having been accumulated from November, 1968, through November, 1970, but not paid out to royalty owners until on or about August 28, 1978.

Under Opinion 699 and 699H 981 interest holders nation-wide received $1,167,000.00 in suspense royalties in July, 1976, same having been accumulated from July, 1974, through April, 1976.

Under Opinions 770 and 700A there were about 1,353 interest holders, nation-wide, who received suspended royalties of about $2,676,000.00, same having been accumulated from July of 1976 through January of 1978, and paid out principally in April, 1978.

Sun has admitted that no interest was paid on proceeds held in suspense that were ultimately paid to the royalty owners.

The court has ordered that plaintiff Wortman and Moore are members of a class of approximately 2,300

members (actually, 3,159 notices were mailed by plaintiffs) of royalty owners and overriding royalty owners who received suspense royalties from Sun as a result of Opinion Nos. 586, 699, 699H, 770 and 700A pertaining to gas rates. First class mail notices have been mailed to all of such royalty owners in accordance with pressure sensitive mailing labels furnished for each member of the class by Sun. Plaintiffs have caused the notices to be mailed and have borne the expense thereof. As a result of the notice, 105 members of the class have been specifically excluded and 50 addresses did not receive the notice, leaving total notices received of 3,003, who are class members in this case.

Testimony at time of trial included the deposition of George Wehrmaker, controller for Sun, who testified in part as follows:

"Q. As Sun Gas received monies, FPC suspense monies, pursuant to Opinion 699, FPC Opinion 699, and pursuant to FPC Opinion 770, and any other applicable opinion where they were suspended, how were those monies handled? Were they handled like any other corporate money, put in the corporate treasury?

A. I believe so, yes. . . So far as I know, that would be the way it would be treated.

Q. The matter of suspense refers only to an accounting system, is that correct?

A. Yes.

Q. In other words, the money is not separated out and deposited in a separate bank account?

A. That's correct.

Q. Or separate investments of any kind?

A. That's correct.

Q. The money from FPC suspense gas was used then by Sun Gas Company just as any other case or money?

A. I believe so, yes.

Q. Used to make a profit?

A. I hope so, yes."

Meanwhile, Sun made substantial profits, after taxes and interest expense, the amount for the United States being $367,000,000.00 in 1979.

Sun handled the suspense royalties for all royalty owners nation-wide in the same manner and they were paid out at the same time and in the same manner.

Sun furnished to the Federal Power Commission an agreement and undertaking to comply with the provisions of Subsection (c) of §154.102 of the Commission's regulations under the Natural Gas Act, copy which was an exhibit at time of trial and is attached hereto.

Copy of 18 CFR 154.67 and Federal Reserve Bulletins on prime rate charged by banks were made a part of the exhibits at time of trial. These exhibits show that if the rates were not approved, Sun would owe the purchasers interest at 7% per annum until October 10, 1974, at 9% per annum thereafter until September 30, 1979, and that the average prime rate, compounded quarterly, charged by banks according to Federal Reserve Bulletins until date of judgement.

As to all gas royalty owners and overriding royalty owners to whom Sun was accounting, Sun collected all

proceeds from the proposed increased rates including that fraction or percentage increase which belonged either to royalty owners or to purchasers and could in no event belong to Sun. The money belonging to others was deposited to cash in Sun's general account and comingled with its other funds during the suspension periods.

The applicable rates of interest which Phillips would have been required to pay pursuant to the corporate undertaking are established by 18 CFR, §154.67, as follows:

Until October 10, 1974, 7%

October 10, 1974, to September 30, 1979, 9%

October to December, 1979 (June, July, August average) 11.70%

January to March, 1980 (December, January, February) 14.28%

April to June, 1980 (March, April, May) 15.39%

July to September, 1980 (June, July, August) 18.22%

October to December, 1980 (September, October, November) 11.74%

January to March, 1981 (December, January, February) 14.03%

April to June, 1981 (March, April, May) 19.98%

July to September, 1981 (June, July, August) 18.27%

October to December, 1981 (September, October, November) 20.31%

January to March, 1982 (December, January, February) 18.46%

Further rates as determined by Federal Reserve Bulletins

The dates and the amounts of suspense royalties collected by Sun and the dates and amounts of payments of this money by Sun are contained in the records of defendant Sun and are readily ascertainable through the use of their computer.

CONCLUSIONS OF LAW

As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum,* 222 Kan. 527, 567 P.2d 1392 (1977), cert. denied 435 U. S. 961. The only factual distinction is the FPC began making its rate nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produces natural gas.

Sun does business in Kansas and was served with process in Kansas. No question is asserted as to the juridiction of the court over Sun. However, Sun contends the Kansas District Court lacks personal jurisdiction over nonresident members of the plaintiff class and, therefore, the court cannot adjudicate the respective rights to interest against Sun without violating their rights to due process. However, as a general rule, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff,* 428 U. S. 106, 114 (1976), quoting *Barrows v. Jackson,* 346 U. S. 249, 255 (1935). The purpose behind this rule is twofold:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders

> of those rights either do not wish to assert them or will be able to enjoy them regardless of whether the court litigant is successful or not. . . Second, third parties themselves usually will be the best proponents of their own rights." (*Singleton v. Wulff*, 428 U. S. at 113-114.)

This rule is particularly compelling where Sun's position is directly adversary to the class members, the class members were given first class mail notice, and elected to stay in the action. No class member has contested the requested judgement against Sun. By attempting to elminate nonresident members of the class, Sun is attempting to eliminate most of its liability. It is not really interested in the rights of nonresident plaintiff class members except to eliminate such liability. The members who have stayed in the class have stayed in after due notice and because they want to collect the interest which is due them. They are represented by the named plaintiffs and by attorneys for the plaintiff class, not by Sun.

Nonresident plaintiffs have chosen Kansas as the forum by electing to stay in the case rather than to exclude themselves. The U. S. Supreme Court has ruled many times on the question of whether a judgement in a plaintiff class action is binding upon class members who are not residents of the forum state. (See *Hansberry v. Lee*, 311 U. S. 32 (1940); *Soverign Camp of the Woodmen of the World v. Bolin*, 305 U. S. 66 (1938); *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U. S. 146 (1917); *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662 (1915). Each of these decisions arose within the firm factual framework, i.e., a class member seeking to enforce or attack

a judgement in the court of a sister state, and in each case the due process issues were raised by a party whose rights had been adjudicated in his absence. However, it was held that such party was bound as a class member.

Sun argues that only Wortman and a few other members of the class are Kansas residents and so the class consisting of all of Sun's royalty owners in six states should not have been certified. The argument is not new. The same argument was made in Shutts, *supra*, and was answered in that opinion, Pages 541 to 558 as follows:

> 1. The "minimum contacts" test applies to nonresident *defendants*, not plaintiffs. (P. 541-542.)
>
> 2. The element necessary to the exercise of jurisdiction over nonresident plaintiff class members is *due process*. (P. 543.)
>
> 3. In suits of a representative character, if a class is adequately represented, its interests are protected. (543-544.)
>
> 4. "If state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society. . .?" (P. 545.)
>
> 5. "The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which otherwise is treated alike." (P. 545.)
>
> 6. "There are questions of law and fact common to the plaintiff class" (residents and nonresidents). (P. 546.)
>
> 7. "After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plain-

tiffs in a class action of procedural due process guarantees are met." (P. 547.)

8. ". . . a class action may be binding on nonresident plaintiffs when a '*common fund*' is involved and where due process requirements are met." (P. 552.)

9. "Here the notice given fully comports with Federal Rule No. 23, K.S.A. 60-223 and any possible constitutional requirements." (P. 554-444.)

10. ". . . adequate representation has been accorded the plaintiff class members by their representative through his attorneys who have done a superior job. . ." (P. 556-557.)

11. The class is more manageable with nonresidents of Kansas included because all royalty owners were treated alike, regardless of residency, particular lease provisions or royalty agreements. (P. 556.)

12. All of the royalty owners have a common interest in the money collected as suspense royalties. (P. 557-558.)

13. It was the same FPC regulation that caused the suspense royalties to be collected. (P. 558.)

14. Suspense royalties were paid out pursuant to the same FPC Opinion. (P. 558.)

15. All of the gas royalty owners have an interest in common with each other, in the equivalent of a "common fund" to a claim damages payable as interest, and *they have a contact with Kansas by reason of such common interest.* (P. 558.)

All of the following cases, involve identical legal issues and factual situations, to the *Shutts* case, *supra*, and they

all hold that it was proper to include nonresident plaintiff class members:

a. *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 434 U. S. 1068.

b. *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080.

c. *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S. Ct. 1242.

d. *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634.

e. *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, cert. denied 98 S. Ct. 1246.

f. *Nix v. Northern Natural Gas Producing Co. and Mobil*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S. Ct. 1246.

g. *Helmley v. Ashland Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

The holdings of the Kansas court are consistent with U.S. Supreme Court decisions, federal court decisions and decisions of other states.

Accordingly, both because there is no present deprivation of any right of a class member and also because Sun lacks standing to argue the due process rights of its adversaries, this court declines to review the constitutional question presented.

Nonresident plaintiff class members have submitted themselves to the jurisdiction of the Kansas court. The Kansas statute, K.S.A. 60-223, is copied after the federal rule, F.R. Civ. P. 23. Provisions in both the federal

rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. To bind absent class members, the due process protections of notice and representation must be afforded. (Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).) Adequate notice has been provided in this case and Sun challenges neither the method of notice (by first class mail) nor the form or quality of representation.

It is without question in Kansas that producers owe interest to their royalty owners on FPC suspense royalties held and used by the producers. (*Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 98 S. Ct. 1246; *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S. Ct. 1242; *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634; *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, cert. denied 98 S. Ct. 1246; *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S. Ct. 1246; and *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.)

Sun is liable for interest on all royalty and overriding royalty retained by it during the period that royalty was collected and suspended by Sun pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion No. 586 as to suspended royalties paid in 1978 and under Opinion No. 699 and 770, with the exception of those who excluded themselves and those whom the first class mail notice did not reach.

The applicable rate of interest for which Sun is liable is seven percent (7%) per annum until October 10, 1974,

nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.

The period of time for which interest is due shall be calculated from the date or dates said suspense royalty was received by Sun to the date or dates said suspense royalty was paid. Following the respective payouts, the remaining interest (principal according to the U. S. Rule) shall bear interest according to 18 CFR 154.67.

Sun has or can compile through its data base and computer program all of the necessary information with which to calculate the amount of interest due and owing.

All findings and orders set forth in the Journal Entry certifying the class are incorporated herein.

Excluded from this judgement are those parties who have filed herein their exclusion and those parties who did not receive notice.

Interest statutes in other states are not applicable here. (*Shutts, supra,* Pages 563-566.)

> "In the instant case Phillips was obligated by FPC order to pay gas purchasers seven percent (7%) until September 13, 1970, and thereafter eight percent (8%) interest on the gas purchaser's share of the suspense monies. Here equitable principles require, and contractural principles dictate, that the royalty owners receive the same treatment as to their share." (*Shutts, supra*, page 563.)
>
> "Phillips cites the interest laws of Kansas, Texas and Oklahoma. K.S.A. 16-201 provides. . . Texas Rev. Civ. Stat., Art 5069-1.03 (1971) states. . . Oklahoma stat., title 15, §266 (1966) states . . . all these

statutes refer to situations where there is no agreement as to the rate of interest. Here that situation does not exist." (*Shutts, supra,* Pages 563-564.)

"We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay seven percent (7%), and later eight percent (8%), interest to the gas purchasers *pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement,* with regard to the monies accumulated in the suspense fund by Phillips *to pay seven percent and later eight percent interest,* as ultimately determined by the FPC Opinion No. No. 586."

> ". . . the FPC did require Phillips to agree to pay interest on the suspense monies they held, *which agreement the members of the plaintiff class herein assert as an appropriate measure of damages, expressed in terms of interest, for the commingling and use of the monies by Phillips."* (*Shutts, supra,* Pages 564-565. Emphasis supplied.)

Thus, it is the Kansas law that neither the statutory interest rates of Kansas nor the statutory interest rates of other states where there are nonresident lessors, apply. Rather, the rates of interest as determined by FERC apply as a measure of damages.

Sun may not enrich itself in the absence of any contractural sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest.

Judgement shall be entered herein as of December 12th, 1983, for plaintiff class in accordance with the foregoing conclusions. Since judgement is for damages for unjust enrichment, expressed in terms of interest, the statutory judgement rate of 15% (K.S.A. 16-204) should apply.

Plaintiff is requested to draw the appropriate Journal Entry to conform to the foregoing findings of fact and conclusions of law.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

Original - file

Copy: Mr. Luke Chapin
Mr. Gerald Sawatzky

(District Court Certification Omitted in Printing)

EXHIBITS 1-3

Copies of notices attached here were printed earlier in this Joint Appendix, see pages 64-68.

EXHIBIT 4

Copy of agreement is printed in this Joint Appendix, see pages 79-80.

ATTACHMENTS

Copy of 18 CFR 154.67 and Federal Reserve Bulletin is printed in this Joint Appendix, see pages 81-92.

(Filed December 29, 1983)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspend-d proceeds or royalties pursuant to FPC Opinions or FERC,	)	No. 79C40
Plaintiffs,	)	
vs.	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

ON the 13th day of October, 1983, at ten o'clock a.m., this case comes regularly on for hearing and trial. Plaintiffs appear by and through W. Luke Chapin of Chapin & Penny, Attorneys, Medicine Lodge, Kansas 67104; and Ed Moore, Ginder & Moore, 202 South Grand, Cherokee, Oklahoma 73728. Defendant Sun Oil Company appears by and through William C. Phelps, Sun Exploration & Production Company, IV North Park, P. O. Box 2880, Dallas, Texas 75221; and Gerald Sawatzky, Foulston, Siefkin, Powers & Eberhardt, 700 Fourth Financial Center, Wichita, Kansas 67202.

THEREUPON, parties announce to the court that they are ready for trial; the evidence is introduced; and the court takes the matter under advisement, asking for written suggested findings of fact and conclusions of law from the parties within thirty days.

THEREAFTER, and as of December 12, 1983, the court, having heard the evidence and having received suggested findings and conclusions from the parties, and being well and fully advised in the premises, renders its memorandum decision, which is made a part hereof by reference.

The court finds, generally, in favor of plaintiff class and in accordance with their requested findings of fact and conclusions of law.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1) All findings and orders set forth in the Journal Entry certifying the class are incorporated herein.

2) The findings, conclusions and orders set forth in the court's Memorandum Opinion and Decision of December 12, 1983, are incorporated herein and made a part hereof.

3) Plaintiff class is granted judgment against Sun for interest on all royalty and overriding royalty retained by it during the period that royalties were collected and suspended by Sun pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion No. 586, as to suspended royalties paid in 1978; and under Opinion Nos. 699 and 770, with the exception of those who excluded themselves and those whom the first class mail notice did not reach.

4) Sun Oil Company is instructed to compile necessary information and to calculate the amount of interest due and owing plaintiff class and each member thereof, according to findings and conclusions of the court.

5) Applicable rate of interest to be used by Sun in calculating amount due each royalty owner is 7% per

annum until October 10, 1974, 9% per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.

6) Judgment is entered herein as of December 12, 1983, and since judgment is for damages for unjust enrichment, expressed in terms of interest, the statutory judgment rate of 15% (K.S.A. 16-204) shall apply following date of judgment.

7) Sun shall inform attorneys for plaintiff class when interest calculations have been completed and as to the total amount of the same; and the court shall then set the matter for further hearing as to attorneys' fees for attorneys for plaintiff class.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

(Counsel's Approval Omitted in Printing)

(Dated October 26, 1984)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 56,494

RICHARD WORTMAN and HAZEL MOORE,
Appellees,

v.

SUN OIL COMPANY,
Appellant.

SYLLABUS BY THE COURT

1.

The issues raised concerning commonality, due process, and improper interest are identical to, and thereby controlled by *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984).

2.

An issue may be considered on appeal even though not considered by the trial court of it involves only a legal question arising from proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of a fundamental right. *State v. Puckett*, 230 Kan. 596, 640 P.2d 1198 (1982).

3.

A mutual, open, running account is an account kept in writing of a connected series of debit and credit entries of reciprocal charges and allowances which the parties intend not to be considered independently but as a continuation of a related series. The statute of limitations,

therefore, does not run against each item separately, but only against the balance due.

4.

The "United States Rule" is applicable to interest on suspense royalties. It provides that in applying partial payments to an interest-bearing debt, which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal.

5.

Post-judgment interest is proper on an unpaid judgment, when the sum owed is certain or can be easily ascertained by calculation at the time of judgment.

Appeal from Barber district court; CLARENCE E. RENNER judge. Opinion filed October 26, 1984. Affirmed and remanded.

Jim H. Goering, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Gerald Sawatzky,* of the same firm, and *William C. Phelps,* of Sun Exploration and Production Company, of Dallas, Texas, were with him on the briefs for the appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for the appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action to recover prejudgment interest on suspended gas royalties held and used by Sun Oil Company for several years. Sun appeals from the district court judgment in favor of the class.

Appellees are owners of mineral leaseholds located in Texas, Oklahoma, Louisiana, Mississippi, New Mexico and Kansas. Appellant is the lessor which produces natural gas from each appellee's leasehold. The royalty owners seek prejudgment interest on certain gas price increases received by Sun but held in suspension for a period of time.

On several occasions during the 1960's and 1970's, the Federal Power Commission (FPC) allowed Sun to charge its purchasers increased rates for the natural gas produced from appellees' leaseholds. During the pendency of the administrative proceedings and appeals involving these price increases, Sun began receiving money at the increased rates, but did not pay the increase to its royalty owners. In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases which were not ultimately approved. Sun then informed its royalty owners payment of the increased price would be suspended until final approval of the increases.

The principal price increases which were the basis for the current action are set out in FPC Opinions 699, 699H, 770 and 770A. Opinion No. 586, rendered in 1968, had been decided pursuant to the FPC's "area rate approach" and involved only the Hugoton-Anadarko area which consists of all of Kansas and parts of Oklahoma and Texas. In 1974, the FPC abandoned the area rate approach in Opinion No. 699. Opinions 699, 699H, 770 and 770A set "national rates." It was during the administrative and court appeals concerning these FPC increases that Sun began to receive the increased rates on which the royalty owners now claim interest.

The price increases allowed by Opinions 699 and 699H were collected by Sun from July, 1974, through April, 1976. A total of 670 properties were involved: 43.7% from Texas, 24% from Oklahoma, 22.8% from Louisiana, 3.9% from New Mexico, 3.4% from Mississippi, and 2.1% from Kansas. Nine hundred eight-one interest holders were affected. The total suspended royalty under these opinions was $1,167,000. This amount was paid to the royalty owners in July, 1976.

The price increases allowed by opinions 770 and 770A were collected by Sun between December, 1976 and April, 1978. A total of 690 properties were involved: 40.3% from Texas, 31.6% from Oklahoma, 23.6% from Louisiana, 3.3% from New Mexico, 0.9% from Mississippi, and 0.3% from Kansas. One thousand three hundred fifty-three interest holders were affected. The total suspended royalty under these opinions was $2,676,000. This amount was paid to the royalty owners in April, 1978.

The royalty owners' lawsuit was filed as a class action on August 30, 1979. Notice of the lawsuit was sent by first-class mail to each royalty owner. Three thousand one hundred fifty-nine notices were mailed out. One hundred five of the class members opted out.

The trial court held prejudgment interest was due from Sun to the royalty owners on the suspended gas royalties. Post-judgment interest was also awarded. Sun Oil Company appeals.

Appellant first argues Kansas law is violated by including in the plaintiff class nonresident members who do not own Kansas leases. Sun claims such a class action fails to meet the commonality prerequisite stated in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527,

557, 567 P.2d 1292 (1977), *cert. denied* 434 U.S. 1068 (1978) (*Shutts I*): "When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact prerequisite of K.S.A. 60-223 (a)(2) will not be fulfilled." *Shutts I*, in which the commonality requirement was fulfilled, pertained to three states and this case pertains to six states. The six states obviously present more variation in laws than the three; however, this case presents the same issues as those in *Shutts I*.

There are substantial facts supporting commonality in this suit which is brought for interest on suspended royalties. The difference between the two cases is merely the degree of Kansas ownership to the total. All members of the plaintiff class are royalty owners of Sun. Their royalties were suspended at the same time. Sun accumulated and used the suspended royalties of all the owners. Sun notified all royalty owners of suspension at the same time. Sun paid all the owners the suspended royalties at the same time. The FPC opinions regulated the rates of all the royalty owners. Sun kept its records and treated all royalty owners the same, regardless of residency.

Sun next argues the due process clause of the Fourteenth Amendment prohibits Kansas from asserting jurisdiction over nonresident class members who do not have "minimum contacts" with Kansas. The basis of its argument is that the United States Constitution requires the existence of a substantial relationship between a state and any individual over which the state court seeks to assert jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). Sun further argues that since *Pennoyer*, the United States Supreme Court has insisted the state asserting jurisdiction

have "minimum contacts" with the party, plaintiff or defendant. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and *Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977). Sun concludes there were no such "minimal contacts" between the nonresident plaintiffs and the state of Kansas. This issue was discussed in depth in *Shutts I*. Additionally, we held in *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, Syl. ¶ 1, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984) (*Shutts II*):

> "While the essential element to establish in personam jurisdiction over nonresident defendants is some 'minimum contact' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process."

Sun contends this Kansas rule is incorrect and should be reversed.

Sun next maintains the trial court applied an improper interest rate to the suspended royalties. Pursuant to Sun's agreement with the FPC to refund to gas purchasers any accumulated amounts of unapproved price increases, Sun also agreed to an interest rate to be paid on those amounts. The trial court applied that agreed-upon rate to the suspended royalties. Sun argues the statutory prejudgment rate of interest of each state should instead be applied. The Court of Appeals held in *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338, 564 P.2d 579 (1977), *aff'd in part, rev'd in part* 223 Kan. 441 (1978), that the law of the forum pertaining to interest was applicable rather than the laws of the various states of residence of the plaintiffs. In *Shutts I*, 222 Kan. 527, Syl. ¶ 22, we stated:

> "Where a gas producer, under circumstances described in the foregoing syllabus, files a corporate undertaking with the Federal Power Commission, wherein it *agrees* to pay 7% interest on 'FPC suspense monies' until rate proceedings are determined by the commission, and 8% thereafter on the gas purchasers' share of the 'impounded' money, in the event the commission orders a refund, equitable principles require that the royalty owners receive the same treatment as to their share . . . ."

The foregoing issues concerning commonality, due process, and improper interest are identical to those raised and decided in our previous decision in *Shutts II*, 235 Kan. 195, and are almost identical to *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (1978); *Sterling v. The Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied* 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978); *Shutts I*, 222 Kan. 527; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345, *rev. denied* 222 Kan. 749 (1977); *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338.

It is interesting to note Sun Oil Company, appellant in this case, filed an *amicus* brief in *Shutt II* in opposition to the royalty owners' position there. All three issues were thoroughly discussed and decided adverse to Sun's position in that case.

Sun's reply brief in this case was filed after the decision in *Shutts II*, giving it the full benefit of that decision. Its argument here is that *Shutts II* should be reversed. Sun presented no new matter in support of this contention other than that discussed and rejected in *Shutts II*.

We have reconsidered all of Sun's arguments on the first three issues and find no reason to reverse *Shutts II*. Thus, the issues raised justify no further discussion; we merely reaffirm our previous decisions.

The next issue raised by Sun Oil is whether a portion of appellees' claim is barred by the statute of limitations. Price increases allowed by Opinion 699 and 699H were collected by Sun from July, 1974 to April, 1976. They were paid out in July, 1976. Also in July, 1976, the FPC issued Opinion 770. Price increases from Opinion 770 and 770A were collected by Sun between December, 1976 and April 1978, when this amount was paid. This action was filed August 30, 1979, on the theory of unjust enrichment, which is in the nature of an implied contract. Thus, the three-year statute of limitations of K.S.A. 60-512 is the period about which their argument centers. It provides:

> "The following actions shall be brought within three (3) years; (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing. (2) An action upon a liability created by a statute other than a penalty or forfeiture."

Appellant contends recovery for interest on suspense royalties paid in July, 1976, are barred by the three-year statute of limitations.

This issue was raised at trial, but the trial court made no specific ruling on it. We have held if an issue on appeal involves only a legal question arising on proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of fundamental rights, the appellate court may consider the issue even though it was not considered by the trial court. *State v. Puckett*, 230 Kan. 596,

Syl. ¶ 1, 640 P.2d 1198 (1982). The issue raised by Sun. of statute of limitations is a question of law. The record was uncontroverted as to when payments were made, when the opinions were issued, and when the case was filed. We conclude this is a question of law properly before this court.

The royalty owners argue the payments are not one-time transactions as contemplated by the three-year statute of limitations of K.S.A. 60-512, but rather are open accounts since each royalty owner is paid monthly for his or her share of gas produced. We defined an open account in *Spencer v. Sowers*, 118 Kan. 259, 261-62, 234 Pac. 972 (1925), as follows:

> "A mutual, open, current account may be defined as an account usually and properly kept in writing, wherein are set down, by express or implied agreement of the parties concerned, a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance, as additional related entries of debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account; and where, pursuant to the original, express or implied intention, there is to be but one single and individual liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one party or the other as the balance shall indicate at the time of settlement or following the last pertinent entry of the account."

If an account is mutual, open and running, the statute of limitations runs on the balance of the account, thereby tolling the statute until final payment is made.

The payments made in July, 1976, by Sun, were not a part of the royalty owners' monthly payments for their share of gas produced, but were for an amount of royalty suspended for a period of time and then paid out in a lump sum to each royalty owner. Subsequent monthly royalty payments had no relationship to the July, 1976 payment or interest thereon. We hold, therefore, the transactions between Sun and the royalty owners pertaining to interest on suspended royalty not to be a mutual, open, running account.

However, that does not dispose of this issue. We held in *Shutts I* that the "United States Rule" applies to interest on suspense royalties. The "United States Rule" provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal. 45 Am. Jur. 2d, Interest and Usury, § 99, pp. 88-89; *Shutts I*, 222 Kan. 527; *Jones v. Nossaman*, 114 Kan. 886, 221 Pac. 271 (1923); *Christie v. Scott*, 77 Ka 257, 94 Pac. 214 (1908). By applying the July 1976 payment under FPC Opinions 699 and 699H first to interest and then to suspended royalty, as required by the U.S. Rule, the statute of limitations issue is eliminated. The balance owed the royalty owners is royalty not interest. While interest is covered by implied contract, the payment of royalty is provided for in a written lease, which has a five-year statute of limitations pursuant to K.S.A. 60-511. This statute provides:

> "The following actions shall be brought within five (5) years: (1) An action upon any agreement, contract or promise in writing."

Thus, we conclude this action is not barred by the statute of limitations.

The final issue involves the award of post-judgment interest by the court. Sun argues the granting of post-judgment interest by the trial court in this case was improper since the exact amount of the award permitted pursuant to the court's judgment was unknown at the time of the court's final decision. The court awarded interest at a set rate on each class members' accrued royalties. Thus, after the final judgment, the accrued royalties of each royalty owner had to be multiplied by the interest rate mandated by the court. This did not render the judgment so uncertain as to preclude post-judgment interest. The amount of accrued royalty for each individual and the interest rate were both known at the time of the court's judgment; to determine the exact amount owed under the court's order Sun merely had to multiply these two figures. In the other Kansas suspended royalty cases, cited previously, post-judgment interest was granted when the amounts were unknown to the same extent they are unknown in this case. This issue is without merit.

The judgment of the trial court is affirmed and the case remanded for determination of attorney fees, post-judgment interest, and entry of judgment consistent with this opinion.

(Dated April 12, 1985)

IN THE

SUPREME COURT OF THE STATE OF KANSAS

Richard Wortman and Hazel Moore, et al., Appellees,	)	
v.	)	No. 84-56494-AS
Sun Oil Company, a Delaware Corporation, Appellant.	)	

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

DENIED.

Yours very truly,
Lewis C. Carter
Clerk, Supreme Court

Date April 12, 1985

(Dated November 6, 1985)

SUPREME COURT OF THE UNITED STATES

No. 84-1971

Sun Oil Company,
Petitioner,

v.

Richard Wortman and Hazel Moore, etc.

ON WRIT OF CERTIORARI to the Supreme Court of Kansas.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Court of Kansas for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. .... (1985).

IT IS FURTHER ORDERED that the petitioner, Sun Oil Company, recover from Richard Wortman and Hazel Moore, etc., Two Hundred Dollars ($200.00) for its costs herein expended.

October 7, 1985

Clerk's cost: $200.00

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES
OF AMERICA

To the Honorable the Justices
of the Supreme Court of
Kansas,

GREETINGS:

WHEREAS, lately in the Supreme Court of Kansas there came before you a cause between Richard Wortman and Hazel Moore, et al., Appellees, and Sun Oil Company, a Delaware Corporation, Appellant, No. 84-56494-AS, wherein the judgment of the said Supreme Court was duly entered on the twenty-sixth day of October, 1984, as appears by an inspection of the petition for writ of certiorari and response thereto.

AND WHEREAS, in the 1985 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said petition for writ of certiorari and response thereto, and the Court having granted the said petition.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on October 7, 1985, by this Court that the judgment of the said Supreme Court in this cause be vacated with costs, and that this cause be remanded to the Supreme Court of Kansas for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. ..... (1985).

IT IS FURTHER ORDERED that the petitioner, Sun Oil Company, recover from Richard Wortman and Hazel Moore, etc., Two Hundred Dollars ($200.00) for its costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the----6th----day of----November----in the year of our Lord one thousand nine hundred and eighty-five.

Costs of Sun Oil Company

Clerk's costs: $200.00

/s/ Joseph F. Spaniol, Jr.
Clerk of the Supreme Court
of the United States

No. 84-1971

Sun Oil Company
v.
Richard Wortman and Hazel Moore, etc.

(Dated January 6, 1986)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

RICHARD WORTMAN and HAZEL MOORE, *et al.*,	)	
Appellees,	)	
v.	)	No. 56,494
SUN OIL COMPANY, A Delaware Corporation,	)	
Appellant.	)	

ORDER

Now on this 6th day of January, 1986, the above captioned case is hereby remanded to the Pratt County District Court with instructions to proceed, pursuant to the order of the United States Supreme Court, in accordance with *Phillips Petroleum Company v. Shutts*, 472 U.S. ..... (1985).

It Is So Ordered.

/s/ Alfred G. Schroeder
Alfred G. Schroeder, C.J.
For the Court

(Filed July 14, 1986)

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN, et al.,	)	
Plaintiffs,	)	
-vs-	)	Case No. 79C40
SUN OIL COMPANY,	)	
Defendants.	)	

MEMORANDUM DECISION

Pursuant to Order of Remand issued by the Kansas Supreme Court on January 6, 1986, this case was briefed by the parties and was orally argued before the Court on April 29, 1986. The case had been remanded by the United States Supreme Court to the Kansas Supreme Court and then to this Court as the original Trial Court. Jurisdiction over the class as ordered by this Court has been affirmed. The remaining issues are liability of the defendant, if any, for interest on suspended royalty payments, according to laws of the various states involved and the rate of interest.

The facts of this case are as stated in the original Findings of Fact of this Court and its Memorandum Decision of December 12, 1983, pages 1-6, which are made a part hereof and will not be repeated here, plus the following supplemental finding as to interest rates from March, 1982, to date of judgement in December, 1983:

April to June '82 (March, Apr, May)	16.50%
July to September '82 (June, July, August)	15.72%
October to December '82 (Sept., Oct., Nov.)	12.62%

January to March '83 (Dec. '82, Jan. & Feb. '83)	11.21%
April to June '83 (March, April, May)	10.50%
July to September '83 (June, July, August)	10.63%
October to December '83 (Sept., Oct., Nov.)	11.00%

(Above compounded quarterly. 18CFR 154.67)

CONCLUSIONS OF LAW

The Court has again carefully examined the case law and statutory law of Texas, Oklahoma, Louisiana, New Mexico and Mississippi and compared the laws of each state to the general contract interest law and equitable or moratory interest law as applied by the Kansas Court in *Shutts I* and *Shutts II;* and in this case, I find that all of those states allow a higher interest rate if there is a contract or specific agreement calling for a higher rate of interest, or in situations where equity would require a higher rate; that the equitable or moratory rate is the FERC rate, not the statutory rate; and that there is no conflict with the allowance by the Kansas Court of a contract rate or an equitable agreed rate of interest, the FERC rate, herein to royalty owners resident in other states named above.

Although plaintiffs' remedy, the recovery of interest, sounds in equity, the nature of the action is the enforcement of a written agreement which is governed in Kansas by K.S.A. 60-511 and governed in the other states named above by similar statutes concerning payment of interest under written agreements. The Petition states (pages 2 and 3) that plaintiffs and other members of the class are entitled to recover from Sun for its use of the money on

any one or more of the following theories or for the following reasons:

a. The doctrine of unjust enrichment (*Shutts I*);

b. The equitable principle of paying interest on actual use of money belonging to another (*Shutts I*, Syllabus 20);

c. Equitable principles that class members receive the same treatment as gas purchasers as to interest required by FPC (*Shutts I*, Syllabus 21 and 22);

d. Sun made an express agreement by filing corporate undertaking with FPC to pay interest on the "suspended proceeds" (*Shutts I*, Page 564.)

Legal proceedings are what they are in essence and not what they may be named. (*Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617.) If facts set forth in a petition entitle a party to relief, it is immaterial by what name the action is called. The Court must ascertain the true scope and nature of the action. (1 Am. Jur. 2d, *Actions*, Subsection 5, Pages 545-546.) This case has an unjust enrichment feature, a basis in equity. It also has a contract feature, a basis in contract, both the oil and gas leases and the undertaking filed with FPC. Although plaintiffs' remedy may be of an equitable nature, for damages, the basis of the action arises from and grows out of written agreements. If the action is one for damages, that in and of itself does not convert it to something other than an action growing out of written contracts. (See *Baker v. Skinner*, 63 Kan. 83, 64 Pac. 981; and *Thompson v. Phillips Pipeline Co.*, 200 Kan. 669, 438 P.2d 146.)

As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1392 (1977), cert. denied 434 U.S. 961. The only factual distinctions

are the numbers involved and that FPC began making its rates nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produces natural gas.

The Court adopts the choice of law discussion set forth by the Kansas Supreme Court in *Shutts I*. I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I come to the same result concerning FERC interest rates to be applied as before. All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgement. After date of judgement, the Kansas judgement rate of 15% per annum simple interest applies.

The only states where the liability issue of interest on FPC suspense royalties has been presented directly are Kansas, Texas and Louisiana. Leading cases on the liability issue are as follows:

Kansas: *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 434 U.S. 1068; and *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d .....;

Texas: *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480;

Louisiana: *Boutte v. Chevron Oil Co.*, 315 F. Supp. 524.

In this case there is one key fact: for several years Sun used money owed to royalty owners all the while knowing it never owned the money. While Sun collected 8/8th of the increased rates, the 1/8th royalty share could never belong to Sun. That royalty share, according to eventual FERC ruling and Court approval, was either to go to royalty owners, or back to gas purchasers, with interest, or part to one and part to the other. This is true regardless of whether the increased rates were ultimately approved, disapproved or approved in part and disapproved in part. Finally the rate increases were approved, the approval conclusively determining that from the date of receipt of the increased rates the gas was worth the increased amount. Thereafter, the suspense royalties were paid to the gas royalty owners, but without interest and without any suggestion that interest was due.

There is nothing in the interest statutes of the other five states involved that would not allow the Kansas Court to grant contract rate interest or equitable or moratory interest in this case. There is nothing in the interest statutes of other states involved that would not allow the granting of FERC interest where Sun has agreed to pay FERC interest to purchasers in the event of refund of the same money. Any alleged conflict overlooks the essential

basis for the suit, seeking interest as required by contract and equity. No authority has been found demonstrating Texas or Oklahoma or any other state involved takes a narrower view of that requirement.

By accepting the rate increases on the condition of having to repay purchases with interest at FERC rates, even remotely prudent practices dictate that Sun invested the money so as to yield at least 9% which was the FERC rate during all the periods of suspension herein and until payout. Thereafter, and in August, 1979, this suit was filed, and after September 1979, and the increase in FERC rates from 9% simple interest to the bank prime rate, compounded quarterly, Sun deliberately chose to contest paying interest rather than to pay and avoid much higher FERC rates that came later.

Many Kansas Supreme Court opinions on FPC suspense royalty interest were handed down in the period 1974 to 1978 when Sun was accumulating and using these FPC suspense royalties:

a. *Shutts I* supra;

b. *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080;

c. *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S.CT. 1242;

d. *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634;

e. *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, cert. denied 98 S.CT. 1246;

f. *Nix v. Northern Natural Gas Producing Co. and Mobil.*, 222 Kan. 739, 567 P.2d 1332, *cert. denied* 98 S.CT. 1246; and

g. *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

These cases clearly hold Kansas committed to FERC rates on interest to be allowed.

TEXAS

Sid Richardson Carbon & Gas Co. v. Phillips Petroleum Co., 456 F.2d 203 (1972), was a federal case dealing with Texas law. Richardson had a contract with Phillips pertaining to price to be paid by Phillips to Richardson for residue gas. The contract provided for a price "equal to the price . . . which Phillips receives . . . for gas sold to El Paso Natural Gas Company. . ." The contract further provided that in the event Federal Power Commission orders required Phillips to refund to El Paso, the price to Richardson also would be adjusted. The contract said nothing about interest, but the case definitely states at Page 201:

> "Phillips made refunds to El Paso under Federal Power Commission orders together with interest. . ."

The Court further held:

> "Phillips contends that the Texas law prohibits the award of interest on interest. . . We think Phillips misses the mark on this argument. The sum found due is technically interest. In substance, however, it is a part of the sum necessary under the holding of the District Court to place Richardson in parity with El Paso under the contract. Once that sum was determined, it became a part of the whole. Interest was due on so much of the whole as remained unpaid after January 31, 1969."

Texas is a state that has a number of cases, both state and federal, dealing with the subject of interest on FPC

suspense royalties. In all of them, interest has been allowed, at the statutory interest rate of 6% excepting from the *Sid Richardson* case. They include: *Phillips Petroleum Co. v. Adams*, 513 F.2d 355 (1975); *First National Bank of Borger v. Phillips*, 513 F.2d 371 (1975); *Phillips Petroleum Co. v. Riverveiw*, 513 F.2d 374 (1975); *Fuller v. Phillips*, 408 F. Supp. 643 (1976); *Phillips Petroleum Co. v. Hazelwood*, 409 F. Supp. 1193 (1976); *Phillips Petroleum Co. v. Hazelwood*, 534 F.2d 61 (1976); *Stahl Petroleum Co. v. Phillips Petroleum Co.*, 550 S.W.2d 360 (1977); and *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (1978).

The last *Stahl* case was the one where the equitable principles were used in addition to other theories, but the statutory interest rate was applied rather than FERC contract rate because no one had asked for the FERC contract rate.

OKLAHOMA LAW

There are numerous decisions in various jurisdictions fixing an equitable rate of interest different than the statutory rate, such as the Colorado Federal Court case of *Davis Cattle Co., Inc. v. Great Western Sugar Co.*, 303 F. Supp. 1165, cited by plaintiffs. Equitable or moratory interest is distinguished by every state in the nation from statutory interest. It is an underlying facet of American law and demonstrates that the law is fair and just. Sun does not argue that it would be either equitable, fair or just for it to pay only 6% interest when the going rate was twice that or more. Oklahoma follows this doctrine of unjust enrichment, *Monarch Refineries v. Union Tank Car Co.*, 141 P.2d 566 and *Welling v. American Roofing*, 617 P.2d 206.

Roberson Steel Co. v. Harreil, 177 F.2d 12 (Oklahoma, 10th Circuit 1949) was a case involving Oklahoma law. It was said at Page 17:

> "It is the general rule of law in Oklahoma that interest on an unliquidated account or claim is not recoverable until the amount due is fixed by judgement. *Dick v. Essary*, Oklahoma Supp. 203 P.2d 715; *Grand River Dam Authortiy v. Jarvis*, (10th Circuit) 124 F.2d 914; *Saulsbury Oil Co. v. Phillips Petroleum Co.*, (10th Circuit) 142 F.2d 27, certiorari denied 323 U.S. 727, 65 S.CT. 62, 89 L. Ed. 584. But compensation is a fundamental principle of damages, whether the action be in contract or tort; and one who fails to perform his contract is justly bound to make good all damages which naturally and reasonably accrue from breach. And while generally interest is not allowed upon unliquidated damages prior to the entry of judgement, the court may in the exercise of a sound discretion include interest or its equivalent as an element of damages when it is necessary in order to arrive at fair compensation. *Miller v. Robertson*, 266 U.S. 243, 45 S.CT. 73, 69 L. Ed. 265; *Concordia Insurance Co. v. School District No. 98*, 282 U.S. 545, 51 S.CT. 275, 75 L. Ed. 528."

Our Kansas Supreme Court in *Shutts I* said at Page 562:

> "Oklahoma has no decision allowing interest on 'suspense royalties.' However, several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith v. Owens*, 397 P.2d 673 (Oklahoma 1963):

and

First National Bank & T. Co. v. Exchange National Bank & T. Co.

New Mexico undoubtedly would allow the contract - FERC rate. It does have an equitable or moratory interest case, *Chromo Mountain Range Partnership v. Gonzales*, 681 P.2d 724 (1984), which includes the allowance of moratory interest in connection with a land sale contract. (See also *Robb v. Universal Constructors, Inc.*, 665 F.2d 998, 1002.)

The statute quoted by Sun applies "in the absence of a written contract fixing a different rate. . ." In this case, we do have a written contract fixing a different rate, the undertaking filed by Sun with FERC.

MISSISSIPPI

Sun quotes no case in Mississippi that would prevent the Mississippi courts from allowing the FERC contract rate as was done in this case and in *Shutts II*. Mississippi, therefore, undoubtedly would allow the contract rate and the equitable rate allowed in this case.

Statutes of limitation questions raised by Sun at this time are a non issue - a dead issue; but this action is not barred by statutes of limitation either in Kansas or in the other states involved. In addition to the "US Rule" which makes the five year statute pertaining to royalties apply, the agreed or contract rate published by FERC also applies, and the expressed contract statute of limitations applies in all states. The Kansas Supreme Court held in this case that the five year statute, not the three year statute as alleged by Sun, applied. The five year statute applies to written instruments. There were two

written instruments, express agreements or contracts which have relation to this case: (1) the oil and gas leases; and (2) the corporate undertaking filed by Sun with FERC to pay both principal and interest on this same money. Sun continued to argue statutes of limitation in its Petition for Certiorari. The U.S. Supreme Court granted certiorari and remanded the case for reconsideration, but only "in the light of *Shutts II*". *Shutts II* says nothing whatsoever about statutes of limitation. The Kansas Supreme Court remanded to this court to reconsider also "in the light of *Shutts II*". The matter is no longer debatable. Laws pertaining to collection of interest in the other states involved on written obligations are applicable and include all interest sought by plaintiffs to be recovered from a date five years back or more from the date of filing their Petition. Interest is allowed on all amounts collected and used by Sun to a date beginning five years back of the filing of the Petition in this case.

Kansas, through *Shutts I and II*, has developed common law principles applicable to the facts of this case. I find no disregard for the laws of other states nor unfair application of Kansas law to the litigants has occurred. Sun has no constitutional right to avoid judgement in Kansas because it might have convinced a Court in another state to develop its law differently. I find that no unambiguous conflict has occurred in the rulings of *Shutts II* as compared to the established laws of the five other states involved.

Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class,

is hereto attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order.

The Court specifically finds that allowance of only 6% per annum statutory rate in times when bank prime rates rose as high as 10% to 20% was neither equitable nor proper.

Sun should pay the costs of this action, including costs of mailing the first notice on the class order by plaintiffs and the second notice as attached hereto.

Sun is hereby ordered, within 30 days of the date of this order, to account to the plaintiff class for the total amount of money owed pursuant to the interest rates herein applied; and, in the event of appeal, Sun should post bond according to statue.

Defendants' motion to decertify the class is overruled.

These findings and conclusions when filed shall act as a Journal Entry.

/s/ Clarence E. Renner
Clarence E. Renner
District Judge

Original - f le

Copies - W. Luke Chapin
Ed Moore
Gerald Sawatzky
William C. Phelps

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL WORTMAN, Individually and as representatives of certain others,	)	
Plaintiffs,	)	Case No. 79C40
-vs-	)	
SUN OIL COMPANY, a Delaware Corporation,	)	
Defendant.	)	

NOTICE OF CLASS ACTION SUIT AND JUDGEMENT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 700A.

In 1983, you received notice that you are a member of plaintiff class in this suit against Sun for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by Sun subsequent to August 23, 1974. There were about 3,000 gas royalty owners who received suspense payments in excess of $3,000,000.00.

Case was tried in the District Court of Barber County, Kansas, and interest allowed according to Federal Power Commission interest rates; on appeal the Kansas Supreme Court affirmed; on Petition for Certiorari to the U.S. Supreme Court, it remanded to Kansas with instructions to consider further laws of other states involved, including interest rates, "in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. ..... (1985), 86 L. Ed 2d 628, 105 S.Ct. 2965."

This trial court has again considered the matter and allowed interest to you and other members of plaintiff class. your share is proportionate to the amount of suspense royalties you received.

You will be included as a member of plaintiff class and receive interest check from Sun in due time, subject to further possible appeal by Sun; provided, however, you may elect to be excluded from the class and from receiving interest check by sneding [sic] a request for exclusion form which appears at the end of this notice to the Clerk of the Court addressed as follows:

Clerk of the District Court, Barber County Courthouse, Medicine Lodge, Kansas 67104.

This request must be mailed so as to be received on or before August 15, 1986. The court has determined that all requests for exclusion received on or before that date will be granted without further hearing. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will continue to represent him as a member of the plaintiff class.

Judgement in this action, whether for the plaintiff class or the defendant, will be binding upon all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgement or settlement entered or concluded favorable to plaintiff class, nor will excluded class members be held bound in this action if judgement eventually is rendered for Sun.

Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd of the interest fund created. This means

that if the interest judgement entered in your favor is affirmed on appeal and not reversed, the court may award up to 1/3rd of it to be paid to plaintiffs' attorneys to compensate them for representing your interests. If you elect to intervene with your own attorneys, your share of a favorable judgement will not be reduced, excepting for the work done by plaintiffs' attorneys up to date. If you request exclusion from the class, you will not be assessed any attorneys' fees or costs; neither will you receive any share of interest which may be allowed. If Sun should eventually win and no interest is allowed to your class, no attorneys' fees or costs can be assessed to you. if you want further information, please do not call the Judge of [sic] Clerk of the court, but call or write to one of the attorneys listed below.

If you want to remain eligible for interest check, do nothing.

If you want to exclude yourself from plaintiff class and possibility of receiving interest check, send in request below.

.....

Clarence E. Renner
District Judge

Attorneys for Plaintiffs:

W. Luke Chapin
Chapin & Penny
P. O. Box 148
Medicine Lodge, KS. 67104
(316) 886-5611

Ed Moore
Ginder & Moore
202 S. Grand
Cherokee, OK 73728
(405) 596-3383

Attorneys for Defendant:

Gerald Sawatzky
Foulston, Siefkin, Powers & Eberhardt
700 Fourth Financial Center
Wichita, KS. 67202
(316) 267-6371

William C. Phelps
Sun Gas Company
Three North Park East
Dallas, TX 75221

..... (Cut Here) .....

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of certain others,	)	
Plaintiffs,	)	Case No. 79C40
-vs-	)	
SUN OIL COMPANY,	)	
Defendant.	)	

REQUEST FOR EXCLUSION

TO THE CLERK OF THE DISTRICT COURT OF BARBER COUNTY, KANSAS, MEDICINE LODGE, KANSAS 67401:

The undersigned respectfully requests to be excluded from the plaintiff class members in this case in accordance with the terms of this notice of class action and judgement dated July, 1986.

DATED ....., 1986.

Send to:

Clerk of the District Court
Barber County Courthouse
Medicine Lodge, KS 67104

Signature: .....
Print Name: .....
Address: .....
.....
.....
Sun Owner No. .....

(Filed March 30, 1987)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 59,804

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Appellees,

v.

SUN OIL COMPANY,
Appellant.

SYLLABUS BY THE COURT

1.

In a multi-state class action suit for interest on suspended gas royalties, it is held prejudgment interest is appropriate and should be calculated for all members of the class at the interest rate Sun Oil Company agreed to pay its purchasers if its rate increase was not approved by the Federal Energy Regulatory Commission.

2.

In a multi-state class action suit for interest on suspended royalties, post-judgment interest shall be calculated at the statutory rate for each state where the royalties are produced.

3.

In order for a court of this state to exercise jurisdiction over a nonresident class action plaintiff, it must

meet minimal due process requirements—among other things, that a nonresident plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "exclusion request" form to the court.

4.

While ordinarily the costs of sending notice must be borne by the plaintiff class, under the circumstances of this case, the expense of sending additional notice was properly placed upon the defendant.

5.

Generally, limitation statutes are considered as being remedial or procedural in their application and do not affect the substantive rights of the litigants.

Appeal from Barber district court, CLARENCE E. RENNER, judge. Opinion filed March 30, 1987. Affirmed in part and reversed in part.

Gerald Sawatzky, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Jim H. Goering*, of the same firm, was with him on the briefs for appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore*, of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action filed in August of 1979 on behalf of owners of mineral leaseholds seeking to recover suspended gas royalties from Sun Oil Company. This court affirmed the district court's judgment for the plaintiff class in *Wortman v. Sun Oil Co.*, 236

Kan. 266, 690 P.2d 385 (1984). The United States Supreme Court subsequently vacated and remanded this case in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 86 L. Ed. 2d 628, 105 S. Ct. 2695 (1985) (*Phillips*).

While the facts in this case were set forth in some detail in our previous opinion, they will be summarized here for reference purposes.

During the 1960's and 1970's, Sun Oil Company applied to the Federal Power Commission (FPC) for gas price rate increases. While waiting for approval of such increases, Sun charged its purchasers the increased rates, but withheld the increased gas royalties from the owners of the mineral leaseholds.

In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases not ultimately approved together with interest at rates established by the Federal Energy Regulatory Commission (FERC) thereon. Sun then informed its royalty owners that payment of the increased price would be suspended until final approval of the rate increases.

In July of 1976, pursuant to FPC opinions 699 and 699H, Sun paid $1,167,000 in suspended royalties to owners of oil and gas leaseholds in six states: Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas. This payment was a result of price increases collected by Sun between July 1974 and April 1976.

In April of 1978, pursuant to FPC opinions 770 and 770A, Sun paid suspended royalties in the amount of $2 676,000 to royalty owners with property in the six states

listed. This payment resulted from price increases collected by Sun between December 1976 and April 1978.

This suit was filed on August 30, 1979, to recover prejudgment interest on the suspended gas royalties and was subsequently certified as a class action. Notice of the action was sent to 3,159 class members. Of these, 105 members "opted out" of the class, although none of the members were supplied with a request for exclusion ("opt out") form.

The district court determined prejudgment interest was due from Sun to the royalty owners and applied an interest rate derived from Sun's corporate undertaking with the FPC. (Sun had agreed to an interest rate to be paid on accumulated amounts of unapproved price increases refunded to gas purchasers.) The district court also awarded post-judgment interest. This court affirmed the district court's judgment in *Wortman v. Sun Oil Co.*, 236 Kan. 266, as to prejudgment interest.

The United States Supreme Court vacated and remanded this case in light of *Phillips*, holding that application of Kansas contract and equity law to class actions involving gas leases predominantly in other states was sufficiently arbitrary and unfair as to exceed constitutional limits.

On remand, the district judge concluded as follows:

"I have further examined the laws of all states involved herein and applying those laws and case authorities to the facts previously determined, I *come to the same result concerning FERC interest rates to be applied as before.* All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used.

"The interest rates to be applied herein are the FERC interest rates according to 18 CFR 154.67 and as set forth above. The rates are 9% per annum simple interest to September 30, 1979, (after this case was filed in August, 1979) and thereafter at bank prime rates averaged and compounded quarterly, as set forth above until date of judgment. After date of judgment, the Kansas judgment rate of 15% per annum simple interest applies." (Emphasis added.)

The district court also ruled that the Kansas five-year statute of limitations for actions on written instruments was applicable to the claims of both residents and nonresidents. Finally, the district court determined that "opt out" forms should be mailed to class members at the expense of the defendant within 15 days from the filing of the court's decision. Sun appeals from the district court's rulings.

The first issue on appeal is whether the district court improperly applied a prejudgment interest rate derived from Sun's corporate undertaking with the FPC. Sun argues that under *Phillips*, the statutory interest rate of each state in which gas leases are located must be applied.

This issue was recently addressed and resolved in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, ... P.2d ..... (1987) (*Shutts*). In *Shutts*, this court reviewed the law of six jurisdictions containing 97% of Phillips' nationwide leases (Texas, Oklahoma, New Mexico, Wyoming, Louisiana, and Kansas). The court concluded:

"Based upon the law of the five enumerated jurisdictions as above reviewed, and upon all of the facts, conditions, and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust enrichment to hold Phillips liable for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R. § 154.102 (1986) to the time of judgment herein. *These funds held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations as heretofore set forth in this opinion.*" (Emphasis added.) 240 Kan. at .....

Shutts is controlling here and requires us to find the district court applied the proper prejudgment interest rate to the suspended royalties.

Also, pursuant to *Shutts*, we hold that the applicable interest after the date of the judgment, July 14, 1986, shall be the statutory rate for each state where the gas royalty is produced.

In Kansas, K.S.A. 1986 Supp. 16-204(c) sets the rate for post-judgment interest. The statutory interest rates on judgments in all states involved in this action, other than Kansas, are: Texas—18% (Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 [Vernon 1987]); Oklahoma—15% (Okla. Stat. tit. 12 § 727 [1985]); Louisiana—7% (La. Civ. Code Ann. art. 2924 [West 1987 Supp.]); New Mexico—15% (N.M.

Stat. Ann. 56-8-4 [1986]); Mississippi—8% (Miss. Code Ann. § 75-17-7 [1986 Supp.]).

The appellant next alleges the district court erred in failing to require that class members receive exclusion request forms prior to entry of judgment and in ordering the appellant to pay the costs of notice.

With respect to this issue, the district court held:

"Both sides are agreed that it would be desirable to mail an additional notice with an exclusion request attached in order to avoid further arguments on due process. Copy of such notice, as requested by plaintiff class, is hereto attached and is ordered mailed by defendant to all members of the class. Such mailing may be included in the next regular monthly royalty payment disbursed by the defendants, but in no event not later than 15 days from the filing of this order. If there are members of the class not presently receiving royalty payments, on a monthly basis, or if there be members of the class who are no longer receiving royalty payments, then such notice shall be mailed by defendants within 15 days from the filing of this memorandum order."

In order for the district court to properly assert personal jurisdiction over class members whose residences and leases are not in the State of Kansas, minimal due process requirement must be satisfied. These requirements were recently set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-12:

"If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due

process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citations omitted.] The notice should describe the action and the plaintiffs' rights in it. *Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.* Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." (Emphasis added.)

Since opt out forms were never sent to class members with the notice in this case, the district court properly determined such forms must be sent in order to meet minimal due process requirements. The appellant argues, however, that the court erred in not requiring that opt out forms be sent prior to entry of judgment and at the expense of plaintiffs rather than defendants.

Notice to class members must be sent long before the merits of the case are adjudicated. 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1788 (1986). Here, while notice was sent to class members when the class was certified, it did not contain an opt out form.

Appellant cites no authority for its contention that the district court erred by no requiring opt out forms be

sent prior to entry of judgment. Here, the district court had previously ruled in favor of the class and this court affirmed. While the case was ultimately remanded to the district court, members of the class were aware judgment had previously been entered for the class and the primary remaining question was what interest rate would be applied. Under such circumstances, it was proper for the district court to require that opt out forms be sent within 15 days of entry of judgment.

This leaves the issue of whether the responsibility for sending additional notice and opt out forms was properly placed with the appellant. The district court ruled that Sun was responsible for mailing notice with the exclusion request form attached to all members of the plaintiff class. The court further held that such mailing could be included in the next regular monthly royalty payment disbursed by the defendant, but in no event later than 15 days from the filing of the order.

The case of *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974), is relevant to our analysis of this issue. In *Eisen,* a federal district court held a preliminary hearing to determine how to allocate the costs of notice to the class. At the hearing, it was determined that the plaintiff class was likely to prevail on its claim and the defendants were thus ordered to pay 90% of the costs of the action.

In reversing the district court, the Supreme Court ruled that a preliminary procedure, such as that utilized by the district court in *Eisen,* is improper as it "may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials." 417 U.S. at 178.

The court further ruled that a plaintiff must bear the initial notice costs as part of the "ordinary burden of financing his own suit." 417 U.S. at 179.

Since *Eisen*, lower courts have consistently held that notice costs must be borne by the plaintiff class. 7B Wright, Miller & Kane, Federal Practice and Procedure § 1788, p. 233. However, the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978), left the possibility open that in some cases, the cost of notice could be placed on the defendant. The court ruled:

> "In those cases where a district court properly decides under Rule 23(d) that a defendant rather than the representative plaintiff should perform a task necessary to send the class notice, the question that then will arise is which party should bear the expense. On one hand, it may be argued that this should be borne by the defendant because a party ordinarily must bear the expense of complying with orders properly issued by the district court; but *Eisen IV* strongly suggests that the representative plaintiff should bear this expense because it is he who seeks to maintain this suit as a class action. In this situation, the district court must exercise its discretion in deciding whether to leave the cost of complying with its order where it falls, on the defendant, or place it on the party that benefits, the representative plaintiff."

In the instant case, the merits of the case had already been determined against the defendant, Sun. Thus, we hold under the circumstances of this case the costs of

financing the additional notice were properly placed upon the defendant.

Sun next contends the district court erred in applying the Kansas five-year statute of limitations to the claims of nonresident class members insofar as those claims arose out of the 1976 payment of suspense royalties. Sun argues the United States Supreme Court's holding in *Phillips* requires the court to apply the statutes of limitations of each of the states in which the claim arose.

First, it should be noted that, in *Phillips*, the Supreme Court was concerned with the *substantive* conflict between Kansas law and the laws of the states in which the gas leaseholds were located. That substantive conflict related to the interest to be applied to royalty payments—an issue already resolved by this court.

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations and the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

(Filed June 8, 1987)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made of should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,	)	No. 86-59804-AS
Appellees,	)	
v.	)	
SUN OIL COMPANY,	)	
Appellant.	)	

ORDER

Sun Oil Company's motion for rehearing is denied.

The opinion filed March 30, 1987, is modified starting with the next to the last paragraph on page 232 of the advance sheet (241 Kan.) to read as follows:

Generally, limitation statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions § 21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations.

Sun Oil further argues that K.S.A. 60-516 requires the application of the statutes of limitation of the states in which the individual royalty owners reside. That statute provides that when a cause of action has arisen

in another state and by the laws of that state a cause of action cannot be maintained because of lapse of time, no action can be maintained thereon in this state. We hold K.S.A. 60-516 is inapplicable here because it applies only where the cause of action has arisen in another state. Here, the cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi.

We conclude the district court did not err in applying the Kansas five-year statute of limitations to the claims of nonresident class members.

The judgment of the district court is affirmed in part and reversed in part.

HOLMES, J., not participating.

BY ORDER OF THE COURT this 8th day of June 1987.

/s/ Harold S. Herd
Harold S. Herd, Justice
For the Court

(Dated June 19, 1987)

IN THE
SUPREME COURT OF THE STATE OF KANSAS

Richard Wortman, et al., Appellees,	)	
v.	)	No. 86-59804-AS
Sun Oil Company, Appellant.	)	

You are hereby notified of the following action taken in the above entitled case:

Motion to alter court's modification of opinion.

DENIED.

Yours very truly,
Lewis C. Carter
Clerk, Supreme Court

Date June 19, 1987

(Dated July 31, 1987)

Bond No. 8111-98-80

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of certain others, Plaintiffs,	)	
v.	)	No. 79C40
SUN OIL COMPANY, a Delaware Corporation, now known as SUN EXPLORATION AND PRODUCTION COMPANY, Defendant.	)	

SUPERSEDEAS BOND

Sun Exploration and Production Company, formerly known as Sun Oil Company (Delaware), as principal, and Federal Insurance Company, as surety, give this bond in the amount of $1,027,001.92, to assure the payment of the judgment for interest rendered in this case, plus statutory court costs. The principal and the surety company hereby covenant to pay into court a sum sufficient to pay the judgment for interest and costs, up to the above sum, in the event the judgment for interest and costs is not paid when due.

The obligation of this Supersedeas Bond shall be void in the event the judgment herein is paid or is vacated or set aside on further proceedings in the Supreme Court of the United States; otherwise it shall be in full force and effect.

DATED: July 31, 1987.

Sun Exploration and Production Company, Formerly Known as Sun Oil Company (Delaware)

Principal

(Signatures and Power of Attorney Omitted in Printing)

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner.

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR PETITIONER

GERALD SAWATZKY*
JIM H. GOERING
TIMOTHY B. MUSTAINE
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
P. O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608
Attorneys for Petitioner

Date: December 1, 1987

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Do the Due Process Clause, and the Full Faith and Credit Clause of Article IV of the Constitution, require the forum state to apply the limitations law of the state where the claim arose and claimant resides? In this connection, should *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), be overruled; or should Wells' broad dictum that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state" be circumscribed to apply only when the forum state's limitations statute is shorter than that of the state wherein the claim arose?

2. Under the holding in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that the Due Process Clause and the Full Faith and Credit Clause require Kansas state courts, in a multi-state class action, to apply the differing laws of other states to claims for interest arising in each of those states,

(a) must the limitations laws of each of the states wherein the claims arose be applied, and

(b) can the forum state constitutionally disregard the interest rates specified by the other states for similar claims, by ruling that each of those states would adopt the different theory of interest liability adhered to by the forum state?

STATEMENT PURSUANT TO RULE 28.1

Sun Oil Company's name has been changed to Sun Exploration and Production Company, the parent company of which is Sun Company, Inc. The assets of Sun Exploration and Production Company have been transferred to Sun Energy Partners, L.P., of which Sun Exploration and Production Company is the managing general partner. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc., East Texas Salt Water Disposal Company and Van Salt Water Disposal Company. The non-wholly owned subsidiary of Sun Company, Inc., is Suncor, Inc.

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No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR PETITIONER

OPINIONS AND JUDGMENT BELOW

The opinion of the Supreme Court of Kansas (J.A. 145), is reported in 241 Kan. 226, 734 P.2d 1190. The order denying rehearing and modifying the opinion (J.A. 156) has not yet been published. The unpublished decision and judgment of the District Court of Barber County, Kansas, is at J.A. 129.

The foregoing opinions and judgment followed this Court's October 7, 1985, Order and Mandate (J.A. 125) in No. 84-1971, 106 S.Ct. 40, vacating an earlier state court decision, 236 Kan. 266, 690 P.2d 385 (J.A. 113), and district court judgment. (J.A. 95).

JURISDICTION

This Court's jurisdiction in invoked under 28 U.S.C. §1257(3), by petitioner's claim of rights under the Constitution of the United States. The opinion of the Supreme Court of Kansas was entered on March 30, 1987. A timely motion for rehearing was filed on April 17, 1987, and was denied by order entered on June 8, 1987. The Petition for a Writ of Certiorari was filed on August 28, 1987, within 90 days as prescribed by 28 U.S.C. §2101(c). The Petition was granted on October 19, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Sec. 1 of the Constitution of the United States provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

This action was filed on August 23, 1979, in the District Court of Barber County, Kansas, by plaintiffs Wortman (a citizen of Kansas) and Moore (a citizen of Oklahoma), against Sun Oil Company, a Delaware corporation, seeking recovery of interest. Plaintiffs sued individually and as representatives of a class composed of Sun's royalty owners who owned royalty interests in gas wells owned and operated by Sun in the states of Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas. (J.A. 4; Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28). Sun's gas production and sales, and payment of royalties, were handled from its place of business in Texas. (J.A. 35-39; 69 et seq.).

In July, 1976, Sun paid additional gas royalties totaling $1,167,000 to 981 class members. These royalties had accumulated and been held in suspense while the legality of increased rates for which Sun sold the gas, at rates permitted by Federal Power Commission Orders Nos. 699/699H, was being decided. Sun had collected the increased rates, subject to refund if found to be unreasonable. Sun did not pay interest on the funds during the time it had accumulated the increases prior to payout. Only 7 of the 981 class members resided in Kansas, receiving less than 0.006% of the payout. Sun sold the gas to pipeline companies from 670 properties, 43.7% in Texas, 24% in Oklahoma, 22.8% in Louisiana, 3.9% in New Mexico, 3.4% in Mississippi, and 2.1% in Kansas. (Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28).

In April, 1978, Sun paid additional gas royalties totalling $2,676,000 to 1,353 class members. These funds had similarly accumulated pending rate increase approvals

permitted by FPC Orders 770/770A. Only 14 of the class members resided in Kansas, receiving less than 0.5% of the funds. Sun sold the gas to pipeline companies from 690 properties, 40.3% in Texas, 31.6% in Oklahoma, 23.6% in Louisiana, 3.3% in New Mexico, 0.9% in Mississippi, and 0.3% in Kansas. (Defs. Ex. A, J.A. 93; R. Vol. 2, p. 72, Vol. 3, p. 28).

Sun denied liability on the ground that it had no legal obligation to pay the suspended royalty increase until final federal commission approval of the gas rate increase; and affirmatively pled limitations as a bar to all interest claims arising from the July, 1976, royalty payout. Sun asserted that the laws of each of the states in which gas was sold and royalties were paid must govern the claims for interest; and that the Due Process clause of the 14th Amendment and the Full Faith and Credit Clause of Article IV, Sec. 1, of the Constitution of the United States, required the application of those state laws. (R. 141, 154; J.A. 9, 55).

The Kansas district court ruled that Sun was liable for interest at rates required by Kansas law, and that the law of the other states did not apply. (J.A. 95). The Kansas Supreme Court affirmed, *Wortman v. Sun Oil Company*, 236 Kan. 266, 690 P.2d 385 (1984) [J.A. 113], basing its decision on *Shutts v. Phillips Petroleum Company*, 235 Kan. 195, 679 P.2d 1159 (1984), a similar class action interest case. The Court approved an earlier Kansas ruling "that the law of the forum pertaining to interest was applicable rather than the laws of the various states of residence of the plaintiffs." It applied the Kansas five year statute of limitations, thus denying Sun's limitations defense to liability for interest on the July, 1976, royalty payout. (J.A. 118, 122-3; 690 P.2d at 389, 391).

This Court then decided *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), approving Kansas' use of the multi-state plaintiff class action procedure, but reversing Kansas' *Shutts* decision that Kansas law was applicable to the interest claims arising in other states. The laws of the non-forum states were applicable because Kansas did not have "'. . . a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair'", as required by *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) [472 U.S. at 818]. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), which held unconstitutional Texas' application of its limitations law to a foreign claim, was also cited by this Court for the principle that Kansas "'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.'" (472 U.S. at 822). On October 7, 1985, this Court granted Sun's petition for a writ of certiorari asking this Court to review Kansas' denial of Sun's constitutional rights in *Wortman*. The Kansas judgment was vacated and the cause remanded for further consideration in light of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797. (*Sun Oil Company v. Wortman*, No. 84-1971, 106 S.Ct. 40) [J.A. 125].

After remand by this Court, the Kansas Supreme Court in turn remanded back to the state district court for further consideration. (J.A. 128). The district court's further consideration consisted of copying *verbatim* the requested findings and conclusions submitted by plaintiffs (R. 293), which were to the effect that each of the non-forum states wherein the nonresident class members' claims arose would adopt the same theory of interest developed by the Kansas courts. (J.A. 129-140). Thus,

a uniform interest rate was applied to all claims. Sun's limitations defense was rejected without discussion of the federal constitutional issue raised concerning the limitations laws of the other states. (J.A. 138-9).

On Sun's appeal, the Kansas Supreme Court affirmed the district court view that Texas, Oklahoma, Louisiana, New Mexico and Mississippi would each adopt the Kansas contract and equity theory of interest, *Wortman v. Sun Oil Company*, 241 Kan. 226, 734 P.2d 1190 (1987) [J.A. 145], basing this conclusion on its analysis in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987), decided after the reversal and remand by this Court of Kansas' earlier *Shutts* decision The last *Shutts* decision paid little heed to this Court's prior opinion reversing Kansas' application of Kansas law on the basis of clearly apparent differences in the interest laws of Texas, Louisiana and Oklahoma. (472 U.S. at 816-818). Instead, the Kansas court decided that each of the other states would uniformly adopt the Kansas theory.

In a curious twist, the Kansas court also ruled that the differing post-judgment interest rates of each of the other states should apply to the portions of the Kansas judgment covering the claims from each of the states—although that issue was not previously before this Court and was never raised by the parties. (J.A 150).

The Kansas court rejected Sun's contention that the Full Faith and Credit Clause and the Due Process Clause of the Constitution required the limitations statutes of the states in which the claims arose to be applied to claims arising in those states. Reciting an oft-repeated view that limitations laws are "remedial or procedural", the court held that this Court's *Phillips* decision did not require application of the other states' statutes of limitations. 734 P.2d at 1195. (J.A. 155). It applied the Kansas five year statute, although the limitations laws of Texas, Oklahoma and Louisiana, representing over 90% of the claims, would bar those claims arising from Sun's July, 1976, payout of royalty principal.[1]

Sun's motion for rehearing was denied, but the Kansas court modified its opinion, by construing the Kansas "borrowing" statute, K.S.A. §60-516[2] to be inapplicable,

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1. The statutes in effect when this suit was filed were as follows:

Vernon's Texas Statutes, Art. 5526:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

. . .

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

. . ." [See, *Hull v. Freedman*, 383 S.W.2d 236 (Tex.Civ.App.) 1964].

La. Civ. Code, Art. 3538:

"The following actions are prescribed by three years:

That for arrearages of rent charge, . . ."

[See, *O'Neal v. Union Production Co.*, 153 F.2d 157, 158, n.2 (1946), three year statute applies to all royalties under an oil and gas lease].

12 Okla. Stat. Ann. §95:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

. . .

Second. Within three years: An action upon a contract express or implied not in writing; . . ."

2. K.S.A. §60-516 provides: "Where the cause of action has arisen in another state or country and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued."

"because it applies only where the cause of action has arisen in another state. Here, the cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi." (J.A. 157).

The court repeated its holding that Kansas law applied because "limitations statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants. 51 Am. Jur. 2d, Limitation of Actions, §21, p. 605. Accordingly, we hold that *Phillips* does not require application of the various states' statutes of limitations." (J.A. 156).

On October 19, 1987, this Court granted Sun's petition for a writ of certiorari seeking review of these rulings adverse to Sun on its claim of constitutional right under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, Sec. 1, of the Constitution.

SUMMARY OF ARGUMENT

I.

The forum state, Kansas, may not constitutionally apply its longer limitations law to the interest claims of nonresident class members because those claims arise from transactions with which Kansas has no contact. The Full Faith and Credit Clause and the Due Process Clause require the State applying its substantive law to have "a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312, 313 (1981). *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985) establishes that Kansas does not have the "significant contact

or aggregation of contacts" sufficient to constitutionally apply its substantive law to those transactions.

Limitations laws are substantive in nature because they define the time period during which the claimant may seek judicial relief. They are outcome-determinative. In this very case, Sun is not liable at all for interest on the July, 1976, royalty payout in Texas, Oklahoma and Louisiana. This is surely just as substantive as the fact that Texas law imposes a 6% rate whereas Kansas imposes a higher rate of interest on Sun's 1978 payout. Limitations laws represent the considered policy of the *lex loci* that a claim may be maintained until, but only until, the expiration of the limitations period. They are not merely procedural rules which govern how an action may be commenced and maintained, or remedial rules which select one of several remedies. The contrary ruling in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), mechanically applied the early precedent established by *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839).

M'Elmoyle v. Cohen was wrongly decided, in a manner strikingly similar to *Swift v. Tyson*, 16 Pet. 1 (1842), due to reliance on English precedent governing the manner in which the English courts extended comity to the laws of foreign nations. That comity, reluctantly recognized, did not extend to the limitations law of the foreign state where the claim arose, it being rationalized that limitations went to the "remedy". Justice Story, sitting as a circuit justice in *Le Roy v. Crowninshield*, 15 F.Cas. 362, 2 Mason. 151 (1820), applied that English doctrine as a general common law conflict of laws solution, without reference to any constitutional right. Making a detailed analysis, Justice Story conceded that a "right cannot be said to subsist" when a limitations law barred any remedy;

but that he must rule to the contrary because "The error . . . is too strongly engrafted into the law to be removed without the interposition of some superior authority."

When *M'Elmoyle v. Cohen* was later decided, that arbitrary classification of limitations statutes as affecting only the "remedy" had become part of the warp and weave of judicial philosophy to the point that it became true for all purposes, despite the Full Faith and Credit Clause and regardless of the doctrine's inherent irrationality. The constitutional concept of a union of States who must give full faith and credit to each other's laws thus became crippled and altered by a technical common law doctrine developed by English law for reasons utterly inconsistent with the very purpose and structure of our "united" States and with the Full Faith and Credit Clause cementing that Union.

Both *M'Elmoyle* and *Tyson* were decided by the same court when technical common law judicial philosophy prevailed. Both decisions led to long and serious constitutional wrong. *M'Elmoyle* and its progeny, including *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, should be overruled because they establish unconstitutional doctrine which " 'no lapse of time or respectable array of opinion should make us hesitate to correct' ". *Erie R. Co. v. Tompkins*, 304 U.S. at 79 (quoting Justice Holmes).

The adoption of the Fourteenth Amendment to the Constitution long after the *M'Elmoyle-Tyson* era, and the ensuing concept of fairness mandated by its Due Process Clause, reinforce and compel these conclusions. An important element of fairness in this context "is the expectation of the parties" that they will not be affected by the law of a forum state having no relation to the transaction

involved. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 822.

Guaranty Trust Co. v. York, 326 U.S. 99 (1945), required federal courts in diversity cases to apply the limitations law of the state where it was located and whose law governed the claim. In so holding, this Court rejected the view that limitations statutes were merely procedural or remedial. The basic reasoning behind that rule requires the same result when a state is constitutionally obliged to apply the law of another state, as in the present case.

Legal scholars have severely criticized the rule stated in *Wells v. Simonds Abrasive Co.* as constitutionally unsound. The rule encourages indiscriminate forum-shopping by litigants in state and federal courts. Under it a claim may be alive or dead, depending on where suit is filed. The result is to encourage and allow disparate treatment of claims depending on where litigants can prosecute them.

The suggestion by some legal scholars that a forum state may constitutionally apply its shorter limitations statute is not an adequate solution. It is but a partial palliative, and an undue concession to long-established but unsound doctrine. A state having no interest, other than the filing of the suit, in the controversy, has insufficient interest to apply its shorter (or longer) statute of limitations to the claim from another state. In many instances, as in *Wells*, applying the shorter limitation of the forum would effectively deprive plaintiff of any remedy at all.

In the present case, Kansas utilized its longer five year limitations law to breathe life into foreign claims already dead. This result can only encourage forum-

shopping on a massive and continuing scale, in state courts as well as federal courts. But the proper solution to the problem is to recognize and treat limitations laws as substantive in nature for constitutional purposes, thus requiring the forum state having no contacts with the operative facts to apply the law of the state where the claim arose. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 519 (1953) (Justices Jackson, Black and Minton, dissenting). Due process of law, not considered in *Wells*, in any event requires the same result.

II.

The decision below conflicts with *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), which directed the Kansas courts to apply the differing laws of Texas, Oklahoma and Louisiana governing claims for interest. Rather than applying the existing interest laws of those states, Kansas has ventured to predict that the other states would adopt the Kansas contract and equity theory of interest despite differing state constitutional and statutory rates and despite binding judicial precedent from those states.

In *Phillips*, this Court observed that Texas recognizes interest liability for suspended royalties, but that "Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. . . . See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); . . ." (472 U.S. at 817). Upon remand, however, the Kansas court decided that Texas permits a higher equitable rate in such actions, and would adopt the Kansas theory, despite this Court's analysis and in the face of a later Texas decision rejecting all attempts to in-

crease a rate above 6% per annum as awarded in *Stahl*, supra. *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.*, 707 S.W. 2d 943 (Tex. Civ. App. 1986) (Error Refused, NRE, June 25, 1986). In a similar manner, the Kansas court disregarded Oklahoma and Louisiana law, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

Given clear statutory law and judicial precedent, the forum state cannot be permitted to evade that existing, governing law by determining that the forum state has developed legal theories which the other state would adopt if and when presented to its courts. Otherwise, the constitutional limitations upon states having no connection with the claims in suit can easily and regularly be evaded, and rendered for naught by theories of what another state's law ought to be, rather than what it is.

ARGUMENT

I.

The Due Process Clause and the Full Faith and Credit Clause Require the Forum State to Apply the Limitations Law of the State Where the Claim Arose and Claimant Resides Because That Law, Being Outcome-Determinative, Is Substantive in Nature

In refusing to apply the shorter limitations laws of the states where the plaintiff class members' claims for interest arose, the lower court repeated what has become a black letter rule of conflicts law, that "limitations statutes are considered as being remedial or procedural in their application, and do not affect the substantive rights of the litigants." (J.A. 155). The court thereby shunted

aside any meaningful analysis of *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), mechanically concluding that the constitutional requirement of *Phillips* applied only to the "substantive" rights relating to interest. (J.A. 155).

The present challenge to this ancient shibboleth might be approached with less temerity were it not for the doctrine's inherent irrationality; the growing body of academic and judicial criticism of the rule; and this Court's own observation reserving comment on its views, expressed in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778, n.10 (1984). Since the doctrine, we believe, is plainly wrong, being rooted in historical judicial error, we need not traverse the same analytical paths already taken by scholars discussing the subject.[3]

We start with *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), because it is factually indistinguishable from the present case, in that virtually all of the claims for interest arose in favor of nonresidents of Kansas arising from transactions in other states. Kansas did not have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class. Absent those "contacts" Kansas had a lack of "'interest' in claims unrelated to that State. . ." (472 U.S. at 821, 822). Thus the application of its differing law to the out-of-state claims was "suffi-

3. R. Weintraub, Commentary on the Conflict of Laws, Sec. 9.2B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185, 221 (1976); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492, 496-497 (1919).

A recent review citing most of the voluminous literature is Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 44.

ciently arbitrary and unfair as to exceed constitutional limits." (472 U.S. at 822).

Citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981) as requiring those conclusions, this Court in *Phillips* related "fairness" to the "expectation of the parties":

> "When considering fairness in this context, an important element is the expectation of the parties. . . There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas 'to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state', . . . but Kansas 'may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.' Home Ins. Co. v. Dick, supra, at 410. . ."

Allstate Ins. Co. v. Hague also accepted the due process analysis of *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), which involved a Mexican contract for a shorter limitation period than the limitations statute of the forum. Although plaintiff was a nominal resident of Texas, the Court held that application of the longer Texas limitations law to extend the contract's limitation-of-actions clause violated due process. The insurance contract was issued in Mexico to a Mexican citizen covering a Mexican risk—and thus did not involve potential application of the Full Faith and Credit Clause.[4]

4. On the other hand, *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), upheld the constitutionality of applying the

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United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947), held that the Full Faith and Credit Clause required South Dakota to apply the limitations period contained in an Ohio fraternal benefit society's constitution, to a death benefit claim provided by it although the decedent member had been a South Dakota resident and South Dakota declared such contract limitations invalid.[5]

Accordingly, a contractual limitation period agreed to by the parties in another state must be applied by the forum state, upon due process and full faith and credit grounds, when the forum state has insufficient contacts with the claims asserted. Since a limitation statute determines the enforceability of a claim in court, like other defenses, logic would seem to require application of the same constitutional principle. That is, a limitations law is just as substantive in nature as a contract limitation, and is not a mere procedural rule. Virtually all of the scholars considering this issue agree that a limitations law is substantive, although their approaches vary. Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 17-18; Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 420 (1980).

But *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 517 (1953), relying upon a line of authority commencing with

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Footnote continued—

longer limitations law of the forum, after the insured moved from Illinois, where the policy containing the shorter time limitation provision was issued, to Florida where the property loss occurred.

5. In requiring full faith and credit to be given the shorter limitation period provided in the society's constitution, the Court distinguished the authorities allowing a forum state to apply its limitations period in preference to statutes of limitation in effect where the claim arose. That rule was not questioned by the parties. 331 U.S. at 607.

M'Elmoyle v. Cohen, 13 Pet. 12 (1839), stated in its 5-3 majority ruling:

> "Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state."

The plaintiff in *Wells,* being unable to serve defendant in Alabama where the plaintiff's decedent was killed, sued in federal district court in Pennsylvania where defendant was incorporated for damages under Alabama's wrongful death statute, which included a two year limitations period for bringing suit. This Court upheld judgment barring the action based on Pennsylvania's one year limitations period. The Due Process Clause apparently was not invoked or discussed.

Plaintiff argued that Alabama's two year limitations period was "built-in" to its wrongful death statute, making it substantive in nature. But the Court, citing its prevailing rule "that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state", held that differences based on special limitations periods of a foreign state "are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause." 345 U.S. at 517-518.

Justice Jackson's dissent pointed out the majority rule's encouragement of forum-shopping by litigants generally, and specifically "via the forum non conveniens route". This aspect alone "opens up possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson,* (US) 16 Pet. 1, 10 L.Ed. 865, ever held." (345 U.S. at 522). Moreover, Justice Jackson continued, general statutes of limitations are a part of the single bundle of substantive rights, as applied in *Guaranty Trust Co.*

v. York, 326 U.S. 99 (1945). In particular, special limitations periods contained in statutes creating the right itself had generally been considered substantive. (345 U.S. at 524-526). The Full Faith and Credit Clause, therefore, should require the federal court in Pennsylvania to apply Alabama's two year limitations period.

The majority holding in *Wells* followed what had long ago become a rote recitation, that limitations affects only the remedy not the right—a doctrine arising from the early parochialism of English common law. Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. L.J. 1, 5; Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492, 496.[6] This common law aspect of comity was first utilized to deny application of the Full Faith and Credit Clause in *M'Elmoyle v. Cohen,* 13 Pet. 312 (1839). A short excursion into its origins will demonstrate that *M'Elmoyle* was wrongly decided in a manner strikingly similar to *Swift v. Tyson,* 16 Pet. 1 (1842), overruled, *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938).

Chief Justice Marshall had, in *Hampton v. M'Connel,* 3 Wheat. 234, 235 (1818), applied the Full Faith and Credit Clause, citing *Mills v. Duryee,* 7 Cranch 481 (1813), by stating:

> ". . . [T]he judgment of a state court should have the same credit, validity, and effect, in every other court

6. Contrary to parochial English law, the Continental civil law applies the limitations statutes of the *locus,* rather than the *forum.* Developments in the Law, Statutes of Limitations, 63 Harv. L.Rev. 1177, at 1260, n.689 (1950).

However, England now treats limitations laws as substantive rather than procedural for choice of law purposes, under its Foreign Limitation Periods Act 1984. See footnote 16, infra, p. 32.

> in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, *and none others,* could be pleaded in any other court in the United States." (Our emphasis).

The footnote comment to that ruling states that it remained "open in this court, whether a special plea of fraud might not be pleaded, or a plea to the jurisdiction of the court in which the judgment was obtained; for these might, in some cases, be pleaded in the state court to avoid the judgment." A plea of limitations in the forum was not stated as a possible exception.

Then in 1820, Justice Story sitting as circuit justice in the Circuit Court, District of Massachusetts, decided *Le Roy v. Crowninshield,* 15 F.Cas. 362, 2 Mason. 151 (1820), where the contract made in New York and barred by limitations in New York, was held not to be barred in the Massachusetts federal court. The scholarly study by Justice Story was predicated entirely on the English law of comity among foreign sovereign nations, which classified limitations as not affecting the right, only the remedy. The constitutional implications were not mentioned or ruled upon, presumably due to the judicial philosophy of federal courts later embodied in *Swift v. Tyson.*[7]

His opinion concedes:

> ". . . I can perceive no reason why the right to use that [limitations] defence, good by his own laws, should not travel with the debtor into every other country. . . ." (15 F.Cas. at 368).

7. Cf., Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 So. Calif. L.Rev. 1299, at 1318 (1987).

". . . a statute, therefore that takes away all remedy upon a contract cannot be truly said not to affect the right, or obligatory force, of such contract. . ." (15 F.Cas. at 369).

". . . I am not aware that in any exact legal sense a right can be said to subsist upon a contract, where the law has taken away all the power of enforcing its obligation by any remedy." (15 F.Cas. at 370).

Justice Story applied England's restrictive law of comity, that limitations did not affect the "right", however, because "The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority." (15 F.Cas. at 371).

By the time *M'Elmoyle v. Cohen* was decided in 1839, upon a certificate of a division of opinion among the judges of the sixth Circuit Court, the common law restrictive rule of comity, classifying limitations as not affecting the right but only the remedy, had become dominant. The opinion answers the full faith and credit issue with the arbitrary formula that limitations "is a plea to the remedy; and, consequently, that the *lex fori* must prevail." (Citing *Le Roy v. Crowninshield,* 2 Mason. R. 351, and other similar decisions which did not consider the constitutional issue.) [13 Pet. at 326]. The sovereignty of foreign, independent nations, and reliance on English cases reflecting its parochial jealousy as a sovereign kingdom, was thought to justify the rule. (13 Pet. at 326-7).

Chief Justice Marshall's all-encompassing ruling which would have allowed pleas to defeat the claim only if allowed in the state where the claim arose, but "none

others", *Hampton v. M'Connel,* supra, was essentially treated as dictum, citing technical common law pleading rules and an irrelevant quotation from *Story's Commentaries.* (13 Pet. at 326).

Townsend v. Jemison, 9 How. 407 (1850), without mentioning any constitutional question, applied the limitation of the forum, Alabama, rather than the shorter limitation of Mississippi where the obligation arose, upon the same English rule of comity. The opinion sought to dispel the force of Justice Story's reasoning in support of a different rule in *Le Roy v. Crowinshield,* in part by observing that statutes limiting time for recovering property, such as Virginia's "five years' bona fide possession of a slave", did affect the "right" and were thus different from limitations which "only take away remedies". (6 How. at 419).[8]

It becomes evident to a certainty from these decisions that the English common law of comity was applied to a constitutional full faith and credit issue without examination of the underlying policies. By this means, an artificial and arbitrary doctrine that limitations laws affect only the "remedy" and not the "right", originally intended to preserve a greater sovereignty for England's own laws, entirely governed the application of the Full Faith and Credit Clause of our Constitution.[9]

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8. The view that limitations statutes affect only remedies, not rights, was later used in *Campbell v. Holt,* 115 U.S. 620 (1885), to justify the constitutionality of the Texas legislature's extending a limitations statute after the original period of time had expired. While adhering to the result of that case in *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), Justice Jackson writing for a unanimous Court described that reasoning as "unsatisfactory rationalization." 325 U.S. at 314.

9. Justice Jackson's classic essay, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 30 (1945), citing *M'Elmoyle v. Cohen,* 13 Pet. 312 (1839), states:

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Contrary to the historical purpose of English comity law distinguishing between remedy and right, the Full Faith and Credit Clause was "designed to transform the several States from independent sovereignties into a single unified Nation. [citing *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)]. . ." Justice Stevens, concurring in *Allstate Ins. Co. v. Hague*, 449 U.S. 301, at 322 (1981).

The *Wells* majority, we suggest, rationalized continuing the *M'Elmoyle* rule by putting the cart before the horse. Whether the Full Faith and Credit Clause comes into play in regard to claims arising in a different state, must depend on whether a limitations law is substantive in nature. If it is, the forum must apply that state's law. Rather than re-examining the ancient fiction that limitations laws are merely procedural or remedial, however, the Court extended that fiction to "built-in" limitations periods as well. The error of *M'Elmoyle* in allowing a parochial, arbitrary and fictional classification by English courts to cripple the Full Faith and Credit Clause was thus perpetuated. The rote acceptance of the *M'Elmoyle* rule in *Wells v. Simonds Abrasive Company*, supra, has left the judiciary in our own age to struggle with its consequences.

The present rule, under *M'Elmoyle* and *Wells*, encourages forum-shopping, as Justice Jackson noted in his *Wells'* dissent. While a law encouraging forum-shopping need not perhaps be invalid for that reason, that pernicious

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Footnote continued—

> "We must beware of transposing conflicts doctrines into the law of the Constitution. This is exactly what appears from the opinions to have been done in several of the cases where exceptions were made as to faith and credit due judgments."

consequence does become relevant to deciding the due process question. A critical element of "fairness" required by due process of law is the normal expectation of parties concerning the laws affecting their rights. The evil of forum-shopping is fully as relevant to the full faith and credit issue. The ability of litigants to obtain different results by hop-scotching among the states is as antithetical to the explicit purpose and command of that Clause as it is to the normal expectation of parties concerning the law which will govern them. A rule of law requiring different results because the claim may be alive or dead, depending fortuitously on the law of a forum, is plainly destructive of sound judicial policy.

The proliferating practice of forum-shopping "via the *forum non conveniens* route" (345 U.S. at 522) is illustrated by *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979). This was an action filed in federal district court in Mississippi for recovery on a claim arising in Kansas. The action was barred by Kansas' two year limitations statute, but not if Mississippi's six year statute applied. The action was transferred pursuant to 28 U.S.C. Sec. 1404(a) to the federal district court in Kansas. *Schreiber* found Mississippi's six year statute applicable, because Mississippi state courts would have applied it to the Kansas claim. So our federal court system made the forum-shopping even more convenient than it would have been in state court, allowing the litigants to avoid Kansas law barring the claim but still trying the case in Kansas.[10]

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10. *Schreiber* was followed in *Goad v. Celotex Corporation*, 831 F.2d 508 (No. 86-3540, 4th Cir. October 16, 1987), where the action was filed in federal district court in Texas to obtain the advantage of its limitations statute. It was then transferred to federal court in Virginia where plaintiffs lived. *M'Elmoyle* and

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But the Third Circuit, in *Ferens v. Deer & Co.*, 819 F.2d 423 (1987), disagreed. Invoking the Due Process Clause and the Full Faith and Credit Clause, Chief Judge Gibbons, for the court's majority, held that a similar action filed in federal court in Mississippi on a claim arising in Pennsylvania, and transferred to federal court in the latter state, must be governed by the limitations statute of Pennsylvania. Citing *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), and *Allstate Insurance Co. v. Hague,* 449 U.S. 301, 310-11 (1981), Chief Judge Gibbons found that limitations laws must also be governed by the concept that application of a State's law is unconstitutional if it has "only an insignificant contact with the parties and the occurrence or transaction". (819 F.2d at 427). The majority in *Ferens* essentially agreed with the strong academic criticism of *Schreiber* in recent treatises and law review articles. E. Scoles & P. Hay, Conflict of Laws 132 (1984); Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 421 (1980); Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 56-65.[11]

Footnote continued—

Wells were cited as governing. In rejecting the "forum shopping" argument, the court cited diversity and venue statutes as permitting different forums (slip opinion n.12), thereby failing to consider the real evil of a *legal* rule which necessarily causes different results in different forums.

McVicar v. Standard Insulations, Inc., 824 F.2d 920 (11th Cir. 1987), and *Ridling v. Armstrong World,* 627 F.Supp. 1057, 1062 (S.D. Ala. 1986), also reached the same result as *Schreiber.*

11. In *Warner v. Auberge Gray Rocks, Inn, Ltee.*, 827 F.2d 938 (3rd Cir. September 3, 1987), plaintiff sued in New Jersey where he was domiciled, for injuries suffered in a ski accident in Quebec, Canada. The court applied New Jersey's two year

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The forum-shopping permitted by the present *M'Elmoyle-Wells* rule is a significant factor impeaching its validity, especially since due process requirements were not considered in its formulation or perpetuation. Now that the passing years have confirmed its unhappy results, we can look back in history to see that the rule was wrong to begin with. Applying the simple truth that limitations laws substantively affect parties' rights, and giving full faith to those laws, will correct the error. In that way, a state's governing laws will be uniformly applied wherever they are invoked, thereby avoiding forum-shopping in federal and state courts.

The room for abuse in multi-state class actions is self-evident. *Phillips Petroleum Company v. Shutts,* 472 U.S. 797 (1985) gives the green light to multi-state class actions, which must, however, apply the laws of different states. That constitutional requirement protects federalism by preventing the class action device from becoming a vehicle for forum-shopping. Comment, Choice of Law and the Multistate Class: Forum Interests in Matters Distant, 134 U. Pa. L.Rev. 913 (1986); Arthur R. Miller and David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts,* 96 Yale L.J. 1 (1986). Because such actions will proliferate in the future, great care must be taken to ensure that correct constitutional standards are maintained. If, as *Phillips* requires, Kansas must apply a

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limitation statute, rather than Quebec's one year statute, because plaintiff's domicile gave New Jersey a sufficient interest. New Jersey would thus not apply its own conflicts rule treating limitations periods as substantive for purposes of applying the limitation statute of the jurisdiction where the claim arose. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). *Warner* did not involve the Full Faith and Credit Clause because the injury did not occur in one of the States.

different interest rate required by the law of another state to claims arising therein, is it not fully as important to require application of that state's different limitations law? The Seventh Circuit, in *Beard v. J.I. Case*, 823 F.2d 1095, 1104, n.9 (1987), correctly reasoned that the rationale of *Phillips* "may well apply to foreign laws governing the timeliness of an action, thereby calling into question the broad language in *Wells* and *Clay*."

The solution to our problem seems almost too simple, obvious and compelling. The solution merely requires full faith and credit to be given another state's limitations laws which determine whether a claim is alive or dead. This solution does effectuate the natural expectation of the parties that the laws of a state having no contacts with the claim will not be differently applied to allow a different result. It does prevent forum-shopping. It does prevent the injustice, as in *Wells*, of a defendant escaping liability through application of a shorter limitations period in a different state.

And this very simple rule is also reasonable. It casts out the "patently silly" metaphysical arguments distinguishing between right and remedy, and recognizes the true substantive effect of a limitations law upon the enforceable rights of the parties. Martin, Statutes of Limitations and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 419 (1980). It frees our judicial structure from an arbitrary, magical incantation which was already obsolete at the inception of our Union.

The continuing academic criticism of the existing rule treats limitations law as substantive. Yet some critics suggest that the "forum can assert an interest in barring stale claims from litigation in its courts, and this interest

is furthered if the forum applies its own shorter statute of limitations." Grossman, Statutes of Limitation and the Conflict of Laws: Modern Analysis, 1980 Ariz, L.J. 1, 17-18; Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185, 221 (1976). Such a dismissal in the forum, it is said, would not be on the merits, apparently permitting suit to be refiled where the claim arose. R. Weintraub, Commentary on the Conflict of Laws, Sec. 9.2B, p. 515. This approach appears to be a partial concession to an existing irrational rule, as though the rule might not otherwise be altered by the courts. Attributing a significant local interest of the forum in a claim to be governed by another state's law seems theoretical in the extreme.[12]

The true interest of a State, and its only interest, is in regulating the time for claims which its own law governs. Why should the forum's limitations law, whether longer or shorter, affect the result which would necessarily occur had suit been brought where the claim arose? In either event, applying the forum's limitation is improper because it determines the outcome of a claim as to which

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12. A number of state legislatures over the years have enacted "borrowing statutes" intended to apply the other state's limitations law, as a matter of local law, to remedy the plain injustice and forum-shopping resulting from the judiciary's conflicts rule. But these vary, and are inconsistently applied, as exemplified by the Kansas court in this case. See Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 14

A proposed redraft of Restatement (Second) of Conflict of Laws, Sec. 142 (Draft April 15, 1986), along these lines would revise the existing rule into a form of "borrowing", and is nearly as unsatisfactory as "borrowing" statutes have been:

"Sec. 142. Statute of Limitations. An action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence."

the forum has insufficient contact to apply its own governing law. It could as well be argued that the forum has an interest in not barring "fresh" claims (its limitation period being longer than the *lex loci*) as in barring "stale" claims (its limitation period being shorter). We do not subscribe to the concept, the shorter the better, applied to limitations laws, which these scholars implicitly suggest be given constitutional stature. It is for the state creating a claim to specify the period for enforcing it. Nor would it normally be practicable, even if possible, to commence another lawsuit in the other state after being barred by the shorter limitations statute of the forum.[13]

So far as due process is concerned, the expectation of the parties as to governing law relates to the State having significant contacts concerning the claim. So far as full faith and credit is concerned, the same result

13. The result of adopting such a half-way solution to the problem also demonstrates its weakness. Under that scenario, which would presumably allow refiling the suit where the claim arose, logic requires that the barred action may also be brought anew in any other state with a limitations period as long as that of the state where the claim arose.

And if a forum state be permitted to apply its own limitations law, whether longer or shorter, consistency would compel that an action dismissed by the state where the claim arose could be brought anew in a forum state having a longer limitations period.

These consequences demonstrate the inadequacy of the partial solution suggested by proponents which would permit the forum state to apply its shorter limitations statute. Only by consistently treating the limitations issue as substantive, i.e., applying the limitation period applicable in the state where the claim arises, can these illogical and impracticable results be avoided.

The solution which we maintain is required by the Constitution also lends harmony and simplicity to this area of conflict of laws. It carries out the purpose of the Full Faith and Credit Clause in bringing an end to litigation—a policy of finality. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 288 (1980, Justice White, concurring).

is mandated. In neither event is the relative length of the limitations laws in the two States material.[14]

The uniformity required by the Full Faith and Credit Clause admits of no exception by which the local policy of the forum may so substantially affect the enforcement of the foreign claim. Justice Stone's language in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-277 (1935), supports this conclusion:

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. That purpose ought not lightly to be set aside out of deference to a local policy which, if it exists, would seem to be too trivial to merit serious consideration when weighed

14. The Uniform Conflict of Laws-Limitations Act approved in 1982, and adopted in four states, treats limitations as substantive. Section 2 requires the limitations law of the state where the claim arose to be applied, whether shorter or longer, subject to a vague "fairness" provision in Section 4. It replaced what was found to be an unacceptable form of "borrowing" statute in the Uniform Statute of Limitations on Foreign Claims Act proposed in 1957. The Committee's Prefatory Note referred to the difficulty and confusion caused by existing "borrowing" statutes in the states having them, concluding:

"The consensus was that limitations laws should be deemed substantive in character, like other laws that affects the existence of the cause of action asserted." 12 U.L.A. 50 (1987 Supp.).

See discussion in Cooper, Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction, 71 Minn. L.Rev. 363, 384, 388-391 (1986).

Once limitations laws are properly classified as substantive, the federal Constitution itself requires this uniform solution.

against the policy of the constitutional provisions and interest of the state whose judgment is challenged."

An early distinguished jurist, Livingston, J., dissented from New York's application of its shorter limitations law on a claim arising in Connecticut in *Nash v. Tupper*, 1 Caines 402 (N.Y. 1803), basing his view on natural reason, logic and common sense. Pointing out that an interest rate of 7% valid in another state would be enforced though it was usurious in New York, he saw "no reason why the same respect should not be paid to the limitation acts of another state." (1 Caines at 414). His lucid comments on the expectation of the parties and its relationship to consensual limitations, though not based on constitutional issues, are *apropos* in light of this Court's holding in *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), requiring recognition of contractual limitations in the non-forum state. The parties, Justice Livingston said, could validly contract for a limitation period. Even absent such a contract, a consensual expectation existed:

> ". . . I perceive but little if any difference between a written contract of this kind, and a case in which the defendant must be presumed to have had in his eye, the laws of his own state, and, therefore, have virtually agreed to pay these notes, if sued within that period. To leave his state, therefore, prior to that time, and then set up a defence in violation of his own engagement, and the understanding of the plaintiff, is an injustice which ought not to be suffered, if, without a breach of duty, we can prevent it. It may be said that if a party becomes a suitor with us, he must be bound by our laws. This is true, as it respects the form of action, or mode of obtaining

> the remedy. . . The present defence is a perpetual bar to the action, and, therefore, involves in it the merits, and not a mere question of form. . . It would not be easy to assign a reason why an obligation incurred in one state should be cancelled by either of the parties flying to another. We are not, in my opinion, under the necessity of establishing a principle or practice which may so easily be abused, and must always be followed by great injustice. . . ." (1 Caines at 415-416).

The similar reasoning in Justice Jackson's dissent in *Wells* 150 years later applied specifically to the Full Faith and Credit Clause: "The whole purpose and the only need for requiring full faith and credit to foreign law is that it does differ from that of the forum. . ." and requires "that the law where the cause of action arose will follow the cause of action in whatever forum it is pursued." (345 U.S. at 521). His conclusion that *Wells'* encouragement of forum-shopping "opens up possibilities of conflict, confusion and injustice greater than anything *Swift v. Tyson* . . . ever held" (345 U.S. at 522) is being proved daily in our courts.[15]

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15. Justice Jackson's essay, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1, 7 (1945), discusses how judicial philosophy during the *M'Elmoyle-Tyson* era affected the problem at hand:

> "Meanwhile the slavery question had begun to distort men's views of government and of law. Talk of 'state sovereignty' became involved in the issue. The Taney Court wrote in a spirit hard to reconcile with the spirit of the short but uncompromising opinion written for the Marshal Court by Mr. Justice Story. [citing *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839), and referring to Justice Story's opinion in *Mills v. Duryee*, 7 Cranch 481 (1813)]. Although he was still a member of the Court, he did not dissent. Perhaps he dis-

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The comparison with *Swift v. Tyson*, decided in 1842 by the same Court which decided *M'Elmoyle* in 1839, is apt. For in *Swift*, a technical, overly restrictive construction of the Judiciary Act of 1789 unconstitutionally allowed a philosophy of general federal common law to displace state law in federal diversity actions; while in *M'Elmoyle* a technical English doctrine at odds with the very concept of a federal Union[16] permitted evasion of the direct command of Article IV, Sec. 1 of the Constitution by displacing another state's governing law with that of the forum. Both have led to "conflict, confusion and injustice."

In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court faced the argument that a federal court sitting in equity was not required to follow the limitations statute of the state where it sat, and which the state court would

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agreed, as he frequently did, with his associates who were products of the Jacksonian era, but did not carry the difference beyond the conference room. Perhaps he was placated by being several times cited as an authority."

16. England's common law on the subject was changed by its Foreign Limitation Periods Act 1984, after The Law Commission "recommended that all limitations statutes, English or foreign, be regarded as substantive and not procedural for the purpose of the choice of law."

That Act requires the limitation law of the foreign country to be applied to claims arising under the laws of such country; and English limitations law is not to apply, except when English law is also applicable to the claim itself. Josling, Foreign Limitation Periods Act 1984, 129 Solicitors' Journal 631 (Sept. 13, 1985).

Treating limitations acts as substantive, the Act also requires a foreign judgment dismissing a claim as barred by limitations to be final and conclusive, contrary to the old common law rule which would have allowed a new action in England if the latter's limitation period were longer. 129 Solicitors' Journal, at 632.

apply to the same cause, because limitations laws are "remedial only." This argument was rejected:

> ". . . The question is whether such a [limitations] statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?" (326 U.S. at 109).

The "outcome-determinative" test demonstrated that limitations laws were substantive, that the law declared by a State "ought to govern in litigation founded on that law" whether the forum of application is a State or a federal court. (326 U.S. at 112).

The Full Faith and Credit Clause implements the Constitution's design to transform the States into a unified Nation "by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty." Justice Stevens concurring in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, at 322-3 (1981). The policies of *Erie R. Co. v. Tompkins* could only be effectuated by recognizing limitations statutes as "substantive". The equally important constitutional policies of the Due Process Clause and the Full Faith and Credit Clause can only be carried out by recognizing the same reality, that limitations laws are substantive in nature because of their governing impact upon the claim asserted. *M'Elmoyle* and *Wells*, should

be overruled because "no lapse of time or respectable array of opinion should make us hesitate to correct" their unconstitutional effect. *Erie R. Co. v. Tompkins*, 304 U.S. at 79.

The overruling of *M'Elmoyle* and *Wells* is needed in order to carry out the supreme command of our Constitution, and in order to provide a consistent, realistic framework for constitutional law as it is applied in the future.[17]

Due process of law, not considered in those cases, in any event requires the same result. "Fairness" means that limitations laws, being outcome-determinative, must be treated for constitutional due process purposes as substantive in nature. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778, n.10 (1984), left this issue open for decision in an appropriate case.[18] While the two constitutional clauses supplement each other, their purposes are not the same. The one commands "full faith" to a sister state's laws applicable to the parties. The other requires "fairness" in not applying any state's laws which do not fairly apply to the dispute. Aside from this frequently overlapping constitutional protection, the due process requirement alone, as expounded in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), requires limitations laws to be treated as substantive in the same manner as other laws relating to liability or the extent thereof.

17. "Full faith and credit cases are in disarray. Choice of law considerations blend into and become intermingled with jurisdictional minimal contacts notions. . . . A return to greater doctrinal clarity is overdue." Peter Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709, 716 (1983).

18. In *Keeton*, this Court referred to "considerable academic criticism" of the existing rule, but found is "unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation." 465 U.S. at 778, n.10. On remand, *Keeton v. Hustler Magazine, Inc.*, 828 F.2d 64 (1st Cir., September 11, 1987), certified to the Supreme Court of New Hampshire two issues, one of which was whether New Hampshire would permit recovery for libel in other jurisdictions whose limitations statutes had run. The purpose was to obtain a ruling which might avoid the necessity of deciding the federal constitutional issues, should New Hampshire apply foreign limitations statutes to claims arising in the other states.

Free speech, as well as full faith and credit concerns, arise in multi-state libel cases, because "application of the forum's [longer] statute of limitations imposes speech-inhibiting laws . . ." which would "abrogate the home state's sovereignty." Pielemeier, Constitutional Limitations on Choice of Law: The Special Case of Multistate Defamation, 133 Penn. L.Rev. 381, at 434 (1985).

II.

The Judgment Below Violates the Due Process Clause and the Full Faith and Credit Clause by Applying the Kansas Theory of Interest Law to Claims Arising in Other States

This Court, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), reversed the Kansas court's application of Kansas contract and equity principles to claims arising in other states, because their laws apparently conflicted with Kansas law. Kansas utilized interest rates far higher than those of Texas, for example. This Court observed that, while Texas recognizes interest liability for suspended royalties,

> ". . . Texas has never awarded any such interest at a rate greater than 6% which corresponds with the Texas constitutional and statutory rate. Tex. Const. Art. 16, Sec. 11; Tex. Rev. Civ. Stat. Ann., Art. 5069-1.03 (Vernon 1971). See *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978); *Phillips Petroleum Co. v. Adams*, 513 F.2d 355. . ." (472 U.S. at 817).

In *Shutts,* Kansas had applied its equitable theory of unjust enrichment, adopting federal law so as to assess a higher rate of interest than Kansas interest statutes provided. (679 P.2d at 1175, 1180). That federal law, 18 C.F.R. §154.102, was designed to implement federal regulation of natural gas by putting the time-cost of funds, consisting of rate increases collected but found unreasonable and thus refundable, upon the natural gas companies collecting those funds. This served to deter them from collecting rate increases not likely to be approved by the Federal Energy Regulatory Commission. The federal regulation did not apply to funds representing lawful, nonrefundable rate increases nor to the companies' contractual duties to pay royalty to gas lessors on these proceeds of sale.[19]

Yet the Kansas Supreme Court after remand by this Court in *Phillips,* found that Texas' 6% rate was not applicable to claims arising in Texas, stating that "No Texas court ever mentioned the higher rates set by federal regulations. . .", and concluding that "This issue has not been determined by the Texas Supreme Court." (732 P.2d at 1298). Then it decided that all jurisdictions involved, including Texas, would apply equitable principles adopting federal interest rates, as Kansas had, because these "funds

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19. 18 C.F.R. §154.102(c) provided, in pertinent part:

"(c) Refunds. (1) Any independent producer that collects rates and charges pursuant to this section shall refund at such times, in such amounts to the persons entitled thereto and in such manner as may be required by final order of the Commission the portion of any increased rates or charges found by the Commission in that proceeding not to be justified, toegther with interest thereon as required in paragraph (c)(2) of this section . . . ."

The rate established was nine percent simple interest per annum from October 10, 1974, to September 30, 1979; and thereafter was the average prime rate for each quarter compounded quarterly.

held by Phillips as stakeholder originated in federal law and are thoroughly permeated with interest fixed by federal law in the FPC regulations. . ." (732 P.2d at 1313). In this *Wortman* case, remanded for further consideration in light of *Phillips,* the Kansas court adopted the foregoing ruling. (J.A. 150; 734 P.2d at 1193).

But Texas has deliberately applied its state interest rate to suspense royalty obligations, rather than adopting the federal interest rate for state law purposes as Kansas had. In *Stahl,* 569 S.W.2d at 484, the Texas Supreme Court cited the federal regulations governing suspense funds and refund obligations, including 18 C.F.R. §154.102. *Stahl* also quoted from and approved *Phillips Petroleum Company v. Adams,* 513 F.2d 355 (5th Cir. 1975), which had mentioned Phillips' duty to pay the then 7% federal rate on refunds to purchasers, but nonetheless applied Texas 6% rate to the similar case before it. *Stahl* also cited the very first *Shutts* case from Kansas which had adopted the federal rate [222 Kan. 527, 567 P.2d 1292 (1977)], without suggesting Texas should ignore its own state interest rates. (569 S.W.2d at 484, 485; and see 513 F.2d at 366).

After this Court's remand of *Shutts,* Texas re-affirmed that *Stahl* required the 6% rate to be applied whether the recovery was in contract or equity, and that higher "equitable" rates were impermissible. *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.,* 707 S.W.2d 943, 947 (Tex. Civ. App. 1986, Error Refused, NRE, 1986):

> "We conclude that *Stahl* allows courts to award prejudgment interest on equitable grounds at the six percent legal rate of art. 5069-1.03 when no statute provides for such a recovery. It thus enlarges the

class of cases in which prejudgment interest may be granted without increasing the rate of equitable prejudgment interest that may be awarded."

But the case was ignored by the Kansas court in deciding *Shutts* and *Wortman* on remand.

In applying its own constitutional and statutory 6% rate to a case legally identical to this, the Texas court was thus specifically cognizant of the federal regulation specifying a higher rate, but did not see fit to adopt federal law as a part of its state law, in these circumstances. Yet Kansas now disregards Texas law, upon the specious theory that Texas did not discuss the Kansas theory substituting the federal rate for the state rate, in an identical dispute governed by state law.[20]

In short, Kansas now propounds the unconstitutional doctrine that it need not apply the governing law of another state on an identical claim, if the forum state can conceive of theories not specifically stated and ruled upon

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20. Using the same specious reasoning, the Kansas Court disregarded the 6% rate established in Oklahoma and the 7% rate in Louisiana, which this Court observed were in apparent conflict with Kansas law. (472 U.S. at 817).

Louisiana, however, does not impose liability for interest in these royalty cases. *Whitehall Oil Company, Inc. v. Boagni*, 217 So.2d 707, 712, affirmed, 229 So.2d 702 (La. 1969). The Kansas court's contrary conclusion, that Louisiana law was "confusing" and thus that "equity" must decide the case (*Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286, at 1303, 1307), plainly disregards the only Louisiana gas royalty interest case in point.

Oklahoma has a statute providing that acceptance of payment of the whole principal, as such, "waives all claim to interest." 23 Okla. Stat. Ann. §8 (1981). This statute on its face bars liability because Sun advised the royalty owners it was paying the principal, which was accepted. (J.A. 67).

by the other state in arriving at its rule of law. Given clear statutory law and judicial precedent, a forum state cannot be permitted to evade the existing, governing law by determining that the forum state has developed preferable legal theories which the other state would follow if more fully presented to its courts. Otherwise, the constitutional limitations upon states having insignificant contacts with the claims in suit can be avoided and rendered for naught by theories of what the other state's law ought to be, rather than what it is. It is just as wrong to permit the forum state to thus impose its own preferences upon other states, as it is to permit a federal court in Texas, for example, to ignore governing Texas state law by imposing its own equitable theories. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

The Kansas court was not merely "candidly construing" another state's statute, resulting in what might or might not be an "error of construction". *Pennsylvania Fire Ins. Co. v. Gold Issue Min. & M. Co.*, 243 U.S. 93, 96 (1917); *Kryger v. Wilson*, 242 U.S. 171, 176 (1916). Rather, Kansas has gone far beyond attempting candidly to apply specific state statutes and decisions, by exporting its own theory that a state should adopt federal law as state law, in the face of different rates specified by state constitutions, statutes and judicial decisions.

The result is precisely the same as that which this Court found constitutionally impermissible in *Phillips*. It is just such extraterritorial export of a State's own laws which "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause . . . to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980).

No better summary of the Full Faith and Credit Clause has been written than Justice Jackson's Cardozo Lecture[21] which sees in that Clause a "visionary grandeur".[22] In it, Justice Jackson referred to the absence of guidelines in the existing decisions, recommending that courts:

> "candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions under the full faith and credit clause [Note 108: Or, in some cases perhaps, under the due process clause] which the Court may properly decide and as to which it ought at least to mark out reasonably narrow limits of permissible variation in areas where there is confusion."[23]

Justice Stone wrote for the Court in *Pacific Employers Ins. Co. v. Industrial Accident Comm'n.*, 306 U.S. 493, 502 (1939), to the same effect:

> This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state."

Whatever laudable motives inspired the sweeping conclusion that Kansas' theory of interest should uniformly apply in all states, it remains undeniable that those states have not remotely suggested they would adopt federal law to replace rates specified in their statutes and constitutions. Neither lofty motives nor subjective good faith can justify the application of Kansas contract and equity

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21. Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Colum. L.Rev. 1 (1945).

22. Louis L. Jaffe, Mr. Justice Jackson, 68 Harv. L.Rev. 940, 958-9 (1955).

23. 45 Colum. L.Rev. at 27.

law, under the guise of a construction which is nothing more than a prediction that other states would change their existing law to conform to the Kansas theory.

Kansas should not be allowed, so transparently, to exceed the constitutional limit on its power on an issue which it considers important. Otherwise, every other state would be so entitled concerning areas of special interest to each. Substantial and continuing erosion of the Constitution would inevitably result.

The Full Faith and Credit Clause in implementing our federal union does not intrude upon the sovereignty of the states. Rather it preserves to each state its own rightful sovereignty over disputes which its law governs, by obliging " 'each state . . . to give due deference to the laws of other states' ". In order to effectuate this constitutional command in this case, a standard must be articulated, a "set of outer limits" must be imposed, striking down Kansas' refusal to apply the governing law of other states. Within those limits, lower courts can proceed in good faith to determine applicable law.[24]

The standard needed in this case is evident. The "outer limits" are clear. Kansas cannot export its theory adopting federal interest rates for purposes of state law, to other states which have declined to do so, when those states have enacted their own statutes, and have laid down their own laws which differ from Kansas law. Kansas cannot export its own concepts of "equity" to

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24. Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709, 722, 728 (1983).

See also, Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 So. Calif. L.Rev. 1299, at 1329, 1337 (1987).

all other states in the form of a federal common law, in a manner reminiscent of *Swift v. Tyson*.

Kansas must, therefore, give deference to the 6% rate of interest fixed in Texas for Sun's 1978 royalty payout; and to the laws of Louisiana and Oklahoma which do not impose liability for interest at all.

CONCLUSION

The Full Faith and Credit Clause and the Due Process Clause require Kansas to apply the limitations statutes of the states in which plaintiff class members' claims for interest arose. The limitations statutes of Texas, Oklahoma and Louisiana bar claims arising in those states as a result of the July, 1976, payout by Sun, because this suit was not commenced until August 23, 1979. The judgment below should be reversed and vacated, with instructions to enter judgment for Sun Oil Company on those claims.

Phillips Petroleum Company v. Shutts, 472 U.S. 797 (1985), specifically required Kansas to apply the interest laws of the other states in which plaintiff class members' claims arose. With respect to those claims arising in Texas, Kansas imposed its own theory adopting federal law as to rate of interest. It has denied Sun's constitutional right to application of the 6% rate required by Texas law. Kansas imposed its own theory to claims from Louisiana and Oklahoma, which do not impose liability for interest under the circumstances; and whose rates, if liability did exist, were only 7% and 6% per annum, respectively.

Kansas cannot be permitted to evade the existing law of other states under the guise of predicting that

those states would, like Kansas, adopt inapplicable federal law in the place of existing state law, to claims governed by state law. Under this standard, the judgment below should be reversed and vacated as to all claims arising from Sun's 1978 payout in Texas, Oklahoma, and Louisiana, with instructions to enter judgment against Sun Oil Company for interest on the Texas claims at the rate of 6% per annum; and to enter judgment for Sun on the Oklahoma and Louisiana claims.

Respectfully submitted,

GERALD SAWATZKY*
JIM H. GOERING
TIMOTHY B. MUSTAINE
FOULSTON, SIEFKIN, POWERS
& EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371
- and -
EDWYN R. SHERWOOD
P. O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

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*Counsel of Record

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SJN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds of royalties pursuant to FPC Opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS

W. LUKE CHAPIN
Counsel of Record
GORDON PENNY
CHAPIN & PENNY
124 East Kansas
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

STEPHEN JONES
JONES & JENNINGS
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

QUESTIONS PRESENTED

1. Does Sun have a constitutionally protected right to escape payment of its debts as ordered by a court in a forum willing to hear the case just because an action on the debt would be outlawed in another jurisdiction?

2. Does the Constitution forbid the Courts of Kansas from applying Kansas' procedural rules, including its statute of limitations, to claims arising outside the State of Kansas?

3. Should this Court review the Kansas Court's determination that the laws of Texas, Oklahoma and Louisiana would allow royalty owners in those states to collect interest on their royalty suspended by Sun at the same rates as Sun agreed to pay its pipeline customers?

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is a class action to recover prejudgment interest on suspended gas royalties held and used by Sun Oil Company for several years.

The action was filed on August 23, 1979, in the District Court of Barber County, Kansas, by plaintiffs Wortman (a citizen of Kansas) and Moore (a citizen of Oklahoma) against Sun Oil Company, a Delaware cor-

poration. A class was certified by the District Court consisting of all royalty owners and overriding royalty owners to whom Sun made payment of suspended royalties in 1976 and 1978 pursuant to certain Federal Power Commission Opinions. (J.A. 114, 115, 44.)

The oil and gas leases between the plaintiff class royalty owners and Sun, whether in Kansas or any of the other five states involved, provided that the royalty owner should receive from Sun a royalty (usually 1/8th of the proceeds) from the sale of gas. The price of the natural gas involved in this case was regulated by the Federal Power Commission, later the Federal Energy Regulatory Commission.

Sun was permitted to sell the gas at a higher price by FERC orders. In order to collect the higher price pending judicial review of the FERC orders, Sun complied with a regulation of the FERC and filed its undertaking to account for the extra charges and to refund the same if required by the commission at interest rates set out in Section 154.67 of the Code of Federal Regulations. (J.A. 81-85).

Instead of paying the royalty owners the increased proceeds for the sale of gas, and instead of investing the royalty owners' share of the money for their benefit, Sun simply kept the money and used it in its business. (J.A. 73.)

In July of 1976, Sun paid out to its royalty owners the principal amount of the royalty owners' share of certain money which had been accumulated and used by Sun between July, 1974 and April, 1976.

In April of 1978, Sun paid out to its royalty owners the principal amount of the royalty owners' share of other

money which had been accumulated and used by Sun between December of 1976 and April of 1978. (J.A. 116.)

The royalty owners' money which was used by Sun could never belong to Sun, regardless of the final determination of the FERC rates. This money would either belong to the royalty owners, or be refunded to the gas purchasers, with interest, or part to one and part to the other. (J.A. 133.)

In 1976 and 1978 when Sun made the two payouts of additional royalties, Sun did not pay any interest to the royalty owners nor did it say anything about interest or the use of the money, even though several Appellate Court cases had been decided between 1974 and 1978 requiring payment of interest on such monies. (J.A. 133-135.)

The Kansas District Court ruled that Sun was liable for interest to the royalty owners at the same rates that Sun would have been required to pay on refund to its purchasers under the FERC undertaking. (J.A. 95.) The Kansas Supreme Court affirmed, *Wortman v. Sun Oil Company*, 236 Kan. 266 (1984). (J.A. 113.) The Kansas Supreme Court rejected Sun's argument on limitations, stating that the Kansas five year statute of limitations applicable to written contracts applied to these additional royalties due under oil and gas leases. (J.A. 122-123.)

After decision by this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court vacated the Kansas judgment and remanded the case for further consideration in the light of the *Shutts* case. *Sun Oil Company v. Wortman*, No. 84-1971, 106 S. Ct. 40 (1985). (J.A. 125.)

The Kansas Supreme Court then remanded the case back to the District Court. (J.A. 128.)

The case was fully briefed in the District Court and oral argument was had on April 29, 1986. The District Court considered the interest laws of the states involved and found:

> "All states involved herein recognize interest rates higher than established by a general statute in cases where a contract or agreement provides a higher rate and also in cases involving equitable and moratory interest. The laws of the other states do not conflict with the laws of Kansas on the interest rate to be used." (J.A. 132.)

Sun then appealed again to the Kansas Supreme Court, *Wortman v. Sun Oil Company*, 241 Kan. 226 (1987). The Kansas Court, in deciding this appeal, referred to *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764 (1987), which the Kansas Supreme Court had decided a month before. In deciding *Shutts*, the Kansas Supreme Court recognized that this Court had ruled that the application of Kansas law to all of the claims for interest violated the due process and full faith and credit clauses of the Constitution. *Shutts v. Phillips Petroleum Co.*, 240 Kan. at 767. The Kansas Court quoted from the earlier decision of this Court as follows:

> "Petitioner claims that Kansas law conflicts with that of a number of states connected to this litigation, especially Texas and Oklahoma. These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard. . .
>
> "The conflicts on the applicable interest rates, alone - which we do not think can be labeled 'false conflicts' without a more thorough-going treatment than was

> accorded them by the Supreme Court of Kansas - certainly amounted to millions of dollars in liability. We think that the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its law to all claims would be constitutional." (472 U.S. at 816-18.)

The Supreme Court of Kansas then reviewed the law of the other involved states as to 1) whether there was liability to the royalty owners for interest on the suspended royalties; and 2) if there was liability, then what the interest rate should be.

After review of the law of the five other states, the Kansas Supreme Court stated:

> "Based upon the law of the five enumerated jurisdictions as above reviewed, and upon all of the facts, conditions and circumstances presented by this case, we find all jurisdictions would apply equitable principles of unjust enrichment to hold Phillips liable for interest on the royalties held in suspense by Phillips as a stakeholder. Under equitable principles, the states would imply an agreement binding Phillips to pay the funds held in suspense to the royalty owners when the FPC approved the respective rate increases sought by Phillips, together with interest at the rates and in accordance with the FPC regulations found in 18 C.F.R., Section 154.102 (1986), to the time of judgment herein." (240 Kan. at 800.)

The Kansas Supreme Court affirmed the District Court's ruling that each of the involved states would hold Sun liable for prejudgment interest at the same rates mandated by Sun's FPC undertaking. (J.A. 150.)

The Kansas Court did find that each of the states would assess postjudgment interest at a different rate,

and the Court ruled that postjudgment interest should accrue at the statutory postjudgment rates of the various states. (J.A. 150.)

The Kansas Court rejected Sun's contention that application of the limitations statutes of the other states was required, and ruled that the Kansas five year statute of limitations applied. (J.A. 155.)

Sun's Petition for a Writ of Certiorari was granted on October 19, 1987.

SUMMARY OF ARGUMENT

The application by Kansas of its statute of limitations to the claims in this case follows the traditional rule that the limitations law of the forum applies. This rule was well established in the common law before our Constitution was adopted and before the adoption of the Fourteenth Amendment. The rule has been repeatedly approved by this Court.

The other states involved in this litigation, Texas, Oklahoma and Louisiana, all treat their statutes of limitations as procedural - as a part of the remedy, and not as a part of the right. All three states would have applied their own statutes of limitations if this case had been brought in any of those states. Application by Kansas of its rule, which is the same rule that the other states would have followed in similar circumstances, cannot offend the rights or interests of the sister states.

Application of the Kansas statute of limitations in this case is not arbitrary because statutes of limitations serve interests of distinctive concern to the forum. It is up to the forum state, which furnishes the court, to determine how long its courts will be open for litigation

and to determine when claims are too stale to litigate. This interest is independent of the interests of potential defendants or the interests of other states. The policies incorporated in statutes of limitations determine not only when the courts of a jurisdiction will be closed to litigation, but also represent that jurisdiction's determination to furnish a forum when that jurisdiction believes the claim can be fairly litigated.

Defendant cannot claim surprise by the application of the Kansas statute of limitations to an action brought in the Kansas Court. Sun does business in Kansas, and has a registered agent in Kansas. Sun carries on the same business in Kansas for which it is being sued in this case. If Sun had any expectations as to statutes of limitations which might apply to suits brought against it in Kansas, it would have no reasonable expectation other than that the law of the forum would apply.

Plaintiffs concede that action to recover interest on the 1976 payout would have been procedurally barred by Louisiana's three year statute, had this action been brought in a Louisiana Court. However, the action would have been timely in all other jurisdictions, including Oklahoma and Texas.

Texas law on the payment of prejudgment interest has been clarified since 1985. In a series of cases beginning with *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Texas 1985), the Texas Appellate Courts have enunciated a policy on prejudgment interest which clearly requires that the rate agreed upon in the FPC undertaking would be the rate of interest awarded in Texas. The only Louisiana case in point required interest to be paid to the royalty owners at the FPC rates.

Although there is no Oklahoma case in point, analysis of the Oklahoma statutes and analogous cases indicates that Oklahoma would decide the question the same way. The "putative" conflicts suggested by Phillips in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), are more illusory than real. These alleged conflicts were carefully considered by the Kansas Court, and that Court's determination should not be disturbed.

ARGUMENT

I. Application of the Kansas Statute of Limitations in This Case Does Not Violate the Fourteenth Amendment Due Process Clause or the Full Faith and Credit Clause

The longstanding recognition of the rule allowing application of the forum's statute of limitations requires rejection of the constitutional challenge.

Sun acknowledges that the traditional rule is that the limitations law of the forum applies. This has been the accepted conflicts of law rule in American jurisdictions since the adoption of our Constitution. This Court has clearly and frequently recognized the constitutionality of the rule.

Almost 150 years ago in *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839), the Court stated that it was "well settled," that statutes of limitations were a matter of remedy "and consequently that the lex fori must prevail." A statute of limitations, said the Court, "is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of the sovereignty by which it exercises its legislation for all persons and property within its jurisdiction."

The Court thus recognized that the current Kansas rule was the accepted rule of the common law even in 1839 and that there was nothing in the Constitution to forbid it. At the time *M'Elmoyle* was decided, the Fourteenth Amendment due process clause was not a part of the Constitution. But even after adoption of the due process clause, the Kansas rule remained the accepted rule in most common law jurisdictions. See, e.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953). Thus, the rule was embodied in the first Restatement of the Law of Conflict of Laws in 1934 (Sections 604, 605); and it was again embodied in the Restatement (Second) of the Conflict of Laws, published only 16 years ago, in 1971 (Sections 142 and 143). The widespread acceptance of the rule has been frequently noted over the years by this Court, which has repeatedly and consistently echoed the *M'Elmoyle* pronouncements approving the rule.

For example, in *Great Western Tel. Co. v. Purdy*, 162 U.S. 329, 339 (1896), the Court citing *M'Elmoyle*, stated:

> "The limitation of actions is governed by the lex fori, and is controlled by the legislation of the state in which the action is bought, as construed by the highest court of that state, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions."

In *Home Ins. Co. v. Dick*, 281 U.S. 397, 409 (1930) (footnote omitted), the Court noted that "in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." In *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 607-609 (1947), the Court again recognized that the rule currently followed in Kansas was "well estab-

lished" and constitutional. And in *Wells v. Simonds Abrasive Co.*, 345 U.S. at 516-517, the Court several times reaffirmed its prior approval of the "well established rule that the forum state is permitted to apply its own period of limitation."

This history not only demonstrates the settled view of the Court, but is decisive in two other ways as well. First, the widespread acceptance and repeated approval of the Kansas rule—at all relevant times in our constitutional history, including before and after adoption of the Fourteenth Amendment—demonstrate that those who drafted and adopted the due process clause and the full faith and credit clause cannot have imagined that they were casting doubt on, let alone invalidating, this ancient rule. This point bears critically on the understanding of those who adopted the Constitution and the Fourteenth Amendment, but it is relevant as well to the basic principles embodied in the two clauses. As Justice Holmes, speaking for the Court, once said, "If a thing has been practiced for 200 years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . ." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). A rule of such long standing and as well known and widely accepted as the Kansas rule should not suddenly be held to have become offensive to the notions of federalism and fairness that the two constitutional provisions at issue protect. Indeed, so far as we are aware, this Court has never overturned under either provision a choice of law rule of the vintage of the Kansas rule.

A second point, relevant to the due process issue, is closely related. There can be no unfair surprise to Sun, no upsetting of its expectations, when a court merely follows a rule with a history like that of the Kansas rule. As noted below, it is the unexpected that can cause due

process problems for a state's choice of law. Sun, which has done business in Kansas and voluntarily subjected itself to suit there for years, can have no due process complaint when it is faced with a familiar, long established, widely accepted, and repeatedly approved choice of law rule such as the Kansas rule permitting the forum to apply its own statute of limitations.

II. Application of the Forum's Statute of Limitations in This Case Does Not Impair Any Sister - State Interest and Is Not Arbitrary or Fundamentally Unfair

Sun urges this Court to brush aside over 100 years of history and to accept the notion that a new era has dawned in the constitutional principles governing choice of law. Sun suggests that the distinction between procedural rules and substantive law be abolished and that limitations rules be considered as substantive law.

Sun's proposed rule treating the choice of limitations period akin to the choice of substantive law may well have much to recommend it as a matter of policy; but for hundreds of years most common law jurisdictions thought otherwise. It would be inconsistent with the federalist idea reflected not only in the full faith and credit clause, but also in the due process clause, see *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), to interfere with the freedom of states to make just such changes in policy.[1]

---

1. While the purpose of that provision (the Full Faith and Credit Clause) was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. (*Pacific Ins. Co. v. Comm'n.*, 306 U.S. 493 (1939).)

There has been no transformation in the principles governing constitutional limits on choice of law so as to require analysis to begin, as appellant suggests, with a footnote in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n. 10 (1984), or to require a wholly new analysis of the issue. This Court has never repudiated older cases in the area. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-13 (Plurality Opinion). Rather, this Court has always taken pains to decide cases narrowly on their facts and has taken account of and preserved prior rulings in later opinions. Older cases are thus still good law. Indeed, as *Allstate* makes clear, to the extent any change has occurred over the years, the constitutional limits on choice of law have been loosened, not tightened.

Those limits, expressed in numerous rulings on the constitutionality of choices of law in a wide variety of circumstances, have consistently focused on two broad principles—avoiding impairment of sister-state interests and prohibiting unfairness to litigants. (See, e.g., *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978-81; *Allstate Ins. Co. v. Hague*, 449 U.S. at 307-13.)

According to the most recent decision on this issue by the Supreme Court, a choice of law is unconstitutional only if it is "arbitrary" or "fundamentally unfair." (*Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978.) Contrary to Sun's suggestion, this Court has not attempted to dictate the state's choice of law rules, but in the *Allstate* and *Phillips* cases, supra, has confirmed that "in many situations, a state court may be free to apply one of several choices of law." In choice of substantive law, the forum state's contacts need only be sufficient to avoid unjustified impairment of sister-state interests and arbitrary or fundamentally unfair treatment of litigants, and

these standards place only "modest restrictions on the application of forum law." (*Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 2978.) Application of these principles to the Kansas choice of limitations law in this case demands rejection of the constitutional challenge.

III. Application of the Kansas Statute of Limitations in This Case Impairs No Interest of the Other States Involved

Sun suggests that adoption of the Kansas limitations law would offend the interests of Louisiana, Texas and Oklahoma in this litigation. To the contrary, the Kansas Court's adoption of its own statute of limitations in this case would fully respect the interests of the other states, whose laws have been determined to require that Sun pay interest to plaintiffs.

First, declining to apply the other states' statutes of limitations impairs no right created by these states because all of these states treat their applicable statute of limitations as a part of the remedy, not as a part of the right. See *Fenton v. Sinclair Refining Co.*, 283 P.2d 799 (Oklahoma 1955), *Los Angeles Airways, Inc. v. Lummis*, 603 S.W.2d 246 (Texas App. 1980) and *Page v. Cameron Iron Works, Inc.*, 259 F.2d 420 (Louisiana 1958).

These states regard their statutes of limitations as bearing only on their own interests in the administration of justice and not on the underlying rights and obligations of the parties. In none of the three states would the limitations period extinguish defendant's obligation to plaintiffs, and therefore failure to apply the limitations period of those states in no way resurrects an obligation that had been laid to rest by those states' limitations laws. To put the same point another way, the

interest of Oklahoma, Louisiana and Texas in regulating the conduct of defendant is not affected by the choice of a statute of limitations.

The other three states treat their statutes of limitations as procedural, and in the courts of each of these states, the statutes of limitations questions would be regarded as matters of forum law. *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 P.2d 1236 (Oklahoma 1972); *Hobbs v. Hajecate*, 374 S.W.2d 352 (Texas 1964); *Kirby Lumber Co. v. Hicks Co.*, 80 So. 663 (Louisiana 1919). All of these states follow the same rule followed by the Kansas Court in choice of limitations law. For Kansas to follow the rule that the other states would follow in similar circumstances cannot offend the interests of the sister states.

These considerations are sufficient by themselves to show that no sister state interest is impaired by the Kansas Court following the traditional choice of law rule on statutes of limitations.

Of course, the other states could, if they wished, export their statutes of limitations along with their transitory causes of action by declaring their limitations period a part of the underlying rights. Though obviously long aware of the Kansas rule (since the rule is the traditional common law rule, and, indeed, the same as the rule in the other three states), the other three states have not chosen to protect themselves in this way. Evidently, these states do not feel their interests impaired by the adoption of the Kansas statute of limitations in Kansas Courts.

IV. Application of the Kansas Statute of Limitations in This Case Is Neither Arbitrary nor Fundamentally Unfair

The law's long treatment of statutes of limitations as procedural, while not perhaps in itself resolving the constitutional question, is the foundation of the answer to any charge of arbitrariness. With respect to any rule that is procedural, and with respect to statutes of limitations in particular, the forum has a separate and distinct set of interests supporting selection of its law. Thus, Kansas has interests in establishing the rules under which its judicial system will operate, and these interests extend to determining the fundamental question of when the system will be open for a hearing on the merits. It is because of these independent forum interests that, even in cases in which other "nonprocedural" interests are also present, the line between substantive and procedural rules must generally survive the constitutional choice of law analysis that focuses on arbitrariness and unfairness. Not surprisingly, Sun points to no case—and as far as we are aware, there are none—in which this Court has struck down a procedural rule as violating constitutional limits on choice of law. Because statutes of limitations, though they may be "outcome determinative," serve interests of distinctive concern to the forum, the choice of the forum's limitation period under the Kansas rule comports with constitutional standards.[2]

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2. In *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), the Supreme Court noted that it had previously "adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules

(Continued on following page)

Statutes of limitations "represents a public policy about the privilege to litigate." (*Chase Securities Corp. v. Donaldson*, 325 U.S. 304.) It was long recognized that each state's courts have a strong interest, independent of the interests of defendants or the interests of sister states, in deciding for themselves when a claim is no longer fresh enough to adjudicate. Thus, as the Restatement (Second) of Conflicts, Section 142 at 396 (1971) states:

> "Each state determines for itself the period during which suit may be brought in its courts upon a particular claim."

The policy behind this rule is not merely the negative one of keeping stale claims out of court; it is also the affirmative "policy to permit actions to be brought at any time within the prescribed period." (Restatement of Conflicts, Section 604 at 721 (1934).) The long standing common law rule (the current Kansas rule) rests on the judgment that, at least when the sister state that defined the right of action has not conditioned the right on a specified limitations period, these separate forum policies fairly address all concerns about staleness and repose. It is not arbitrary for Kansas to insist, in these circumstances, that staleness is the primary concern and that Kansas will make its own judgment on that issue.[3]

Footnote continued—

in which stability is of prime importance and those in which flexibility is a more important value." Chase held that a state could constitutionally revive a cause of action by extending the applicable statute of limitations.

3. Sun's emphasis on somehow having been deprived of a personal right misconceives the nature of statutes of limitations. As this Court recognized long ago, a statute of limitations is primarily of concern to courts, and only derivatively of concern to litigants.

(Continued on following page)

Sun suggests that Kansas has an interest only in keeping litigation out of its Courts so that applying a limitations period shorter than that of the other states would be constitutional whereas applying a longer period would not. This suggestion ignores the obvious interest that Kansas has in making a forum available to individuals, like the plaintiffs, who are victims of wrongful conduct. As this Court has recently had occasion to observe in another context,

> "It is possible to describe litigation itself as an evil that the state is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. . .
>
> "But we cannot endorse the proposition that a law suit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered

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Footnote continued—

"Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the court from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citation omitted.) They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process, but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is now called a "fundamental" right or what used to be called a "natural" right of the individual." (*Chase Securities Corp. v. Donaldson*, 325 U.S. at 314.)

a legally cognizable injury turns to the courts for remedy: 'We cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.' (*Bates v. State Bar of Arizona*, 433 U.S. at 376.) That our citizens have access to the civil courts is not an evil to be regretted; rather it is an attribute of our system of justice in which we ought to take pride." (*Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265, 2277-78 (1985).)

Kansas has determined to follow this general policy of furnishing claimants a forum when it believes the claim can be fairly litigated and when the state that created the cause of action has not announced that the right of recovery is extinguished when its limitation period expires. There is nothing arbitrary in this determination.

Even under Sun's view of the applicable Louisiana statute of limitations, as to the 1976 payout only, this case was filed only one or two months out of time, and Sun does not contend that anything changed during those one or two months to undermine the fairness of requiring it to defend on the merits. This case involved few disputed facts, and is based upon information in Sun's own accounting records. Sun cannot claim any unfair surprise or upsetting of its expectations in the Kansas Courts' choice of the forum statute of limitations. See *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. at 1280. Sun was actually doing business in Kansas, and had a registered agent in Kansas. Sun was carrying on the same business in Kansas for which it is being sued in this case.

Sun raises the specter of "forum shopping." Richard Wortman, one of the named plaintiffs and class representatives in this action, lives in Medicine Lodge, Barber County, Kansas, as do his attorneys. This action was filed in

Barber County District Court, just across the street from his attorneys' offices. There was no forum shopping here.

It seems to plaintiff that the point at issue with regard to the statute of limitations is not whether the American Law Institute has discussed changes in its Restatement of Conflicts of Laws or whether Great Britain has modified its statutes regarding choices of laws on foreign claims, or whether the use of the traditional common law choice of law rules may encourage forum shopping, but rather the question is whether this ancient rule violates the Constitution of the United States. For all the above reasons, the answer to that question is no.

V. None of the Claims Would Be Time-Barred in Texas or Oklahoma

Sun argues that the limitations laws of Oklahoma, Texas and Louisiana would bar the plaintiffs' claim. Plaintiffs concede that the Louisiana law on limitations for collection of royalty would bar recovery of interest on the 1976 payout had this action been brought in a Louisiana Court and had Louisiana applied its own limitation law.

However, the statutes of Oklahoma and Texas allow five and four years respectively, and Sun is in error in citing those states' shorter limitations statutes not dealing with suits to collect royalties (which necessarily arise out of a written contract - the oil and gas lease).[4]

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4. The Texas and Oklahoma limitations statutes are as follows:

Texas Statutes Annotated, art. 5527. *What actions barred in four years.*

"There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

(Continued on following page)

The Texas four year statute has been applied to suits for additional royalty. (*Foster v. Atlantic Refining Company*, 329 F.2d 485 (1964); *Humble Oil & Refining Co. v. Fantham*, 268 S.W.2d 239 (1954).)

Under Texas law, "an action is 'founded upon a written contract' within four-year statute of limitations, though instrument relied upon contains no express promise to do the things for nonperformance of which the action is brought, if the obligation or liability upon which action is based grows out of a written instrument, not remotely but immediately, or if written instrument acknowledges a state of facts from which, by fair implication, the obligation or liability arises. Rev. St. 1295, art. 5527." (*International Printing Pressmen & Assistants Union of North America v. Smith*, 198 S.W.2d 729 (1947).)

Oklahoma's statute allows five years to bring "an action upon any contract, agreement or promise in writing." (*Smith v. Texas Pipeline Co.*, 171 Okla. 573 (1935).)

VI. The Kansas Court Determined the Laws of Louisiana, Oklahoma and Texas Under the Proper Constitutional Standard, and That Determination Should Not Be Disturbed

Sun complains that the Kansas Courts misconstrued the substantive laws of Louisiana, Oklahoma and Texas in the Kansas Court's finding that each of these states would require payment of interest to the royalty owners

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Footnote continued—

"1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing."

12 Okla. Stat., Section 95. *Limitation of other actions.*

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

"First. Within five years: An action upon any contract, agreement or promise in writing."

at the rates Sun had agreed to pay in its undertaking with the Federal Power Commission.

The Kansas Supreme Court, in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, made a detailed analysis of the Louisiana, Oklahoma and Texas law. *Shutts v. Phillips Petroleum Co.*, 240 Kan. 769-793. This analysis was undertaken by the Kansas Court with full recognition of the mandate of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Kansas Court found that each of the states would require payment of interest on the suspended royalties and that each of the states would find interest payable at the same rates agreed upon by Phillips in its Federal Power Commission undertaking. Sun's bald statement that the Kansas Court "evaded" or "disregarded" the governing laws of these states is without basis in the record. Oklahoma has no cases directly in point, and the Kansas Court tried to determine what the Oklahoma Courts would do if presented squarely with the issues in this case. Louisiana and Texas have a body of law on cases of this type, and the Kansas Court faithfully considered these cases, as well as the statutes of the two states in arriving at its determination. There is nothing to suggest that the Kansas Court was not mindful of the mandate in *Shutts II* or to suggest that the Kansas Court did not candidly construe the laws of these three states. Something more than an error of construction is necessary in order to entitle a party to review by this Court under the full faith and credit clause. See *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) and *Kryger v. Wilson*, 242 U.S. 171 (1916).

A. Louisiana

Louisiana Courts have considered the liability for interest and the rate of interest in cases such as this one.

Boutte v. Chevron Oil Company, 316 F. Supp. 524 (E.D. La. 1970), affirmed, 442 F.2d 1337 (5th Cir. 1971), was a class action by certain landowners to set aside a mineral lease held by Chevron. The landowners asserted that Chevron had failed to pay royalties as required by the lease. In its findings of fact the Court stated:

> "Chevron applied to the FPC for approval of an increased rate of 23.675 cents and, on June 4, 1959, the FPC entered an order permitting the increased rate to become effective April 1, 1959, without, however, approving the rate, and subject to the limitation that:
>
> "Chevron shall, in accordance with its agreement and undertaking, refund at such time and in such amounts to the parties entitled thereto, and in such manner as may be required by final order of the Commission, the portion of the increased rates found by the Commission in this proceeding not justified, *together with interest thereon.*" (Emphasis in original.) (316 F. Supp. at 327.)

Chevron withheld royalties on the increased prices it was receiving pending final FPC approval. This suit was filed and decided prior to FPC final approval of rate increases requested by Chevron.

In its Conclusions of Law, the Court ruled Chevron could properly retain the increased prices pending FPC approval. The Court stated:

> "A judgment which would impose on Chevron an obligation to pay royalties on that part of the funds received from the sale of gas which is subject to possible refund to pipeline purchasers, before Chevron's refund obligation has been determined by final order of the FPC, would deprive Chevron of its property without due process of law and subject it to a multiplicity of legal actions. Therefore, Chevron's calculation of the payment of royalties to plaintiffs is correct. (316 F. Supp. 531.)

The Court distinguished the *Whitehall* case cited by Sun:

> "*Whitehall Oil Co. v. Boagni,* is distinguishable on its facts, particularly in view of the fact that the lease in that case provided that:
>
> "In any case where lessee sells gas or plant products of his and lessor's, lessor shall receive the same price and terms as lessee. . ." (316 F. Supp. at 531.)

The Court in *Boutte* stated that if the FPC granted approval of the rates, then the royalty owners would be entitled to recover interest as set forth in the FPC undertaking.

> "In the event that the FPC approves the provisionally increased rates or any part thereof, interest shall be due and payable, at the rate finally adopted by the FPC, to the royalty owners on the differences between any increase in rate, as finally determined by the FPC, and the amounts previously paid to the royalty owners." (316 F. Supp. at 531.)

Whitehall Oil Co., Inc. v. Boagni, 217 So.2d 707, affirmed, 229 So.2d 702 (La. 1969), is not in point. It was decided under the articles of the Louisiana Civil Code dealing with "payment of a thing not due." (217 So.2d 707 at 709.) Plaintiffs' claims against Sun are obviously not governed by these articles.

B. Oklahoma

There are no Oklahoma cases involving liability for interest on suspended royalties. Thus, the Kansas Court

reviewed Oklahoma statutes and court decisions to determine how Oklahoma Courts would rule on this question, if it were presented to the Oklahoma Court. This analysis is set out in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 778-784. The Kansas Court concluded that Oklahoma would allow interest on the suspended royalties in this case, and that interest would be allowed at the rate required by the FPC regulation.

The Kansas Court's determination of Oklahoma state law on this issue, where no Oklahoma cases in point exist, is similar to the process engaged in by federal courts every day in attempting to predict what state courts would hold if squarely faced with the issues of the case under consideration. The Kansas Courts examined the relevant statutes and the decisions of the Oklahoma Courts in analogous or related areas, and decided that Oklahoma law would require payment of interest at the rates agreed to by Sun in its FPC undertaking. Such determination by a state court has traditionally been held not to be reviewable by this Court.

C. Texas

There is no doubt that Texas would require Sun to pay interest on the suspended gas royalties. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978).

In the *Stahl* case, supra, Phillips filed a declaratory judgment action against Stahl seeking a declaration that it was not liable for the suspense proceeds already paid to Stahl, and in the alternative, that it was not liable for interest thereon. (569 S.W.2d 482.) Stahl had not asserted any claim to interest prior to the time Phillips filed its declaratory judgment action, but Stahl did join issue with a counterclaim for 6% interest. (569 S.W.2d

482, 483.) The Texas Supreme Court found that it would be equitable to compensate Stahl for Phillips' use of the money which Phillips held and used.

> "As to the funds attributable to payment for Stahl's gas, Phillips had no possible right or title. It was in the position of a stakeholder who used royalty monies which were held in suspense. . .
>
> "In the present case Phillips knew that funds attributable to payment for Stahl's gas either would be paid to Stahl or refunded to its customers with interest. It made a conscious choice, without any permission or consent of Stahl, to commingle these so-called suspense funds with its general operating funds. Therefore, it should pay for the use of the sustainable portion of this money." (569 S.W.2d 485.)

As Stahl did not request interest at any rate higher than 6%, and that question was not decided by the Texas Supreme Court, the *Stahl* case is not authority for a limit of 6% interest.

The Texas Supreme Court's holding with regard to allowance of interest had been foretold in a series of federal cases in Texas, including *Phillips Petroleum Company v. Adams*, 513 F.2d 355 (1975). In that case, arising on essentially the same facts, the United States Court of Appeals stated:

> "In this case, Phillips collected money over a period of several years which would ultimately be refunded to its customers or paid to its suppliers; in no event did Phillips ever have the slightest prospect of entitlement to the entire principal sum of suspense money here in question. This money was not placed in an escrow account, nor was it paid to the suppliers as it accumulated, subject to refund, with interest -

a course of action followed by Phillips in other instances. (Footnote omitted.) Instead, burdened with the knowledge that it might have to refund some or all of the funds to its customers at 7% interest, Phillips placed the suspense money in its general account and used it, presumably, in the manner most advantageous to the corporate fisc. Such a course was certainly sound business practice, and in no way repugnant either to the federal regulatory scheme or to Phillips' contractual relations with its suppliers. But that is not to say that Phillips may enrich itself with the income from the Adams family's suspense money in the absence of any contractual sanction. (513 F.2d 366, 367.)

"We also conclude that Phillips must pay interest on the principal sum of the suspense money, and we accordingly reverse the judgment of the District Court on this point. Texas Courts do not insist on statutory rigidity in the allowance of interest, for they realize that the right to interest is a market place concept, and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. To exonerate Phillips from its interest obligation here would be to give the pipeline company an extracontractual lagniappe, for it is incontrovertible that Phillips has derived a very considerable benefit from the unrestricted use of the Adams family's money. Phillips may say that its possession and utilization of funds to which it had no pretense of claim was reasonable, or even that its actions were necessary, but Phillips cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long and not pay a cent for it. (513 F.2d 370.)

Texas prejudgment interest law has developed considerably since the *Stahl* case. In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), the Texas Supreme Court judicially authorized prejudgment interest in personal injury cases:

> "The time has come to revise the prejudgment interest rule to make injured parties whole and restore equity and symmetry to this area of the law. We therefore hold that, as a matter of law, a prevailing plaintiff may recover prejudgment interest compounded daily (based on a 365-day year) on damages that have accrued by the time of judgment. To the extent that other cases conflict with this holding, they are overruled. Prejudgment interest shall accrue at the prevailing rate that exists on the date judgment is rendered according to the provision of Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 Section 2 (Vernon Supp. 1985). In addition to achieving full compensation, awarding prejudgment interest in personal injury cases at a rate close to the market rate will also serve to expedite both settlements and trials." (696 S.W.2d 553, 554.)

The new Texas rule on prejudgment interest applies to all cases in the judicial process when *Cavnar* was decided. *Benavidez v. Isles Construction Co.*, 726 S.W.2d 23 (Tex. 1987.)

The *Cavnar* ruling was extended and clarified in later cases. The Texas Courts have judicially limited the application of the 6% statute. It now applies *only* to cases "involving a fixed sum ascertainable from the contract itself" where there is no agreement as to the rate of interest to be paid. (*Acco Constructors v. Nat. Steel Products*, 733 S.W.2d 368 (Tex. App. 1987).)

In all other cases, the rate to be applied is the contract rate or if no contract, the Texas postjudgment statutory rate. *Allied Bank West Loop N.A. v. C.B.D. & Associates, Inc.*, 728 S.W.2d 49 (Tex. App. 1987) and *McCann v. Brown*, 725 S.W.2d 822 (Tex. App. 1987).

It seems clear that Texas would find liability for interest at the rate Sun agreed to in the FPC undertaking on equitable principles, or, alternatively, because of the fact that there was a written agreement for interest to be paid on this same money. In *International Printing Pressmen & Assistants Union of North America v. Smith*, 198 S.W.2d 729 (Tex. 1947), the Texas Supreme Court found the constitution and by-laws of a union to be a written contract on which a wrongfully expelled union member could bring suit, even though the constitution and by-laws were not expressly made a contract between the union and its member. As against the contention by the union that the constitution and by-laws did not contain any express promise to do the things for the nonperformance of which the union member sued, the Court stated:

> "It is sufficient if the obligation or liability grows out of a written instrument, not remotely, but immediately, or if the written instrument acknowledges a state of facts from which, by fair implication, the obligation or liability arises."

The Texas appeals case cited by Sun, *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.*, 707 S.W.2d 943 (1986), apparently comes under the definition set out in Tex. Rev. Civ. Stat. Ann. art. 59-1.03, of an account in which the sum payable is ascertained from the contract itself, and thus the 6% interest under Texas law applies.

The contract here (Sun's undertaking with the FPC) does not attempt to ascertain the sum payable, but does imply an obligation to pay interest on the money received in advance of final judgment on the FPC order.

CONCLUSION

Application of the Kansas statute of limitations to all claims in this case does not violate either the Fourteenth Amendment or the Full Faith and Credit Clause of the Constitution. The Constitution does not require that *every* choice of law decision made by a state court be supported by significant contacts between the litigation and the state whose law is chosen.

Statutes of limitation represent a public policy judgment by a state as to the time at which an action becomes too stale to proceed in its courts. Statutes of limitation are primarily instruments of public policy and of court management, and do not confer upon defendant any right to be free from liability, although this may be their effect. Statutes of limitations serve interests peculiar to the forum, and are considered as going to the remedy and not the fundamental right itself. The Full Faith and Credit Clause of the Constitution does not require a state to substitute the limitation laws of other states for its own. In this case, the other states involved consider their own statutes of limitations to be procedural and affecting only the remedy, and not the fundamental right. All of the other states involved would apply their own statutes of limitations to actions brought in their courts, and their rights have not been infringed upon by Kansas doing that very thing in this case.

Kansas properly had jurisdiction of the defendant in this action. The defendant does business in Kansas and

is doing the same business in Kansas for which it is being sued in this case. Sun clearly could have expected to be sued in Kansas. If Sun had any expectation as to the statute of limitations which should apply, its only reasonable expectation would be that the limitation laws of Kansas would apply. There is nothing arbitrary or unfair about applying a state's limitation law, which deals primarily with implementing the state's own interests in furthering its public policy.

The Kansas Court correctly applied the laws of the other states under the proper constitutional standard and determined that all of the states would require Sun to pay interest at the same rate Sun had promised to pay to its pipeline customers on this same money, if the money had been refunded.

The decision of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

W. Luke Chapin
Counsel of Record
Gordon Penny
Chapin & Penny
124 East Kansas
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

Stephen Jones
Jones & Jennings
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR PETITIONER

GERALD SAWATZKY*
JIM H. GOERING
TIMOTHY B. MUSTAINE
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

EDWYN R. SHERWOOD
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

Attorneys for Petitioner

Date: February 17, 1988

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

STATEMENT PURSUANT TO RULE 28.1

Sun Oil Company's name has been changed to Sun Exploration and Production Company, the parent company of which is Sun Company, Inc. The assets of Sun Exploration and Production Company have been transferred to Sun Energy Partners, L.P., of which Sun Exploration and Production Company is the managing general partner. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc., East Texas Salt Water Disposal Company and Van Salt Water Disposal Company. The non-wholly owned subsidiary of Sun Company, Inc., is Suncor, Inc.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

REPLY BRIEF FOR PETITIONER

I. Because Limitations Laws Are Substantive in Nature, the Full Faith and Credit Clause and the Due Process Clause Require Kansas to Apply the Limitations Law of the State Where the Claim Arose and Claimant Resides

A. The Artificial Judicial Classification of Limitations Laws As Procedural Is Wrong

The arguments advanced by respondents and *amicus curiae* Wiley Goad rest upon the supposition that limitations statutes are procedural. Their arguments do not consider the reasons that have led scholars and courts to recognize limitations statutes as substantive. Rather, they merely reiterate archaic rationalizations which have no

relation to reality. The result is one fiction flowing from another, i.e., that a state which extinguishes all right to sue on a claim created by that state, nevertheless "intends" that the claim can be sued on later in any distant state having a longer limitations law.

A corollary to this irrational conclusion is that citizens must "expect" to be governed by laws of the most unexpected, unrelated places; and that litigants are presumed to understand the state's "intent" that, though a claim it created is extinguished in that state, it remains alive in each of the other forty-nine states that has a longer limitations law. In this Alice-in-Wonderland legal world the forum state's application of its own different limitations law to claims arising elsewhere is asserted as reflecting the "freedom" of a "sovereign" state. In reality, however, it is a refusal to respect the freedom and constitutional right of another state to govern the substantive claims there arising.

The same inverted logic requires that a limitations defense, which can only be invoked by the affirmative defense of a litigant for his own repose and security, is mysteriously transformed into a mere "administrative" policy relating to "procedure", which affects the remedy but not the right. And in return for the "freedom" which each state has to disregard another state's laws, each state which also subscribes to these fictions loses the right to have its limitations laws respected elsewhere.

According to *amicus curiae* Goad, a state may free itself from the rules of this game by calling its limitations laws "substantive", thus requiring other states to then apply that state's laws—although *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), holds to the contrary. Goad's suggestion, that a state may opt into the coverage of the

Full Faith and Credit Clause, only continues the charade. The truth is that there is no discernable difference between the purpose of a "substantive" limitations law, and a "procedural" limitations law. Both have the same basic purpose and operate in the same way. To say that the "substantive" limitation law is a statute of "repose", while the "procedural" limitations law is not, makes no sense. For a state to selectively control whether the federal Constitution does, or does not, apply, by labeling its limitations law "substantive" or "procedural" would only add to the disorder now rampant in this area of constitutional law.

In this case, Sun Oil Company does not, as charged, seek a new interpretation of the Constitution. Rather, we urge the removal of a historical legal aberration which is contrary to the literal words and the plain purpose of the Full Faith and Credit Clause, as intended by the founders and as needed more than ever today. We also suggest that, once limitations laws are correctly classified as substantive, the Due Process Clause applies just as it would to any other substantive law. The correction of this constitutional error will be a breath of fresh air removing abuses, and reducing existing disorder in relations among our States.

Amicus curiae Goad seriously errs in stating that contemporary scholars do not urge that a change is "constitutionally mandated". (Brief, p. 4). With few, if any, exceptions scholars urge constitutional clarification to correct recognized deficiencies in the present rule.[1]

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1. E.g., Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185, 221 (1976); Grossman, Statutes of Limitations and the Conflict of Laws: Modern Analysis,

(Continued on following page)

Likewise, respondents err in stating that the existing rule was "well established in the common law before our Constitution was adopted. . ." (Brief, p. 6). The common law rule was not generally known nor was it adopted in the United States until the early part of the nineteenth century. See *Le Roy v. Crowninshield,* 15 F.Cas. 362, 2 Mason. 151 (1820), and cases cited therein. The first treatise on the subject was Justice Story's "Commentaries on the Conflict of Laws", first published in 1834. Jackson, Full Faith and Credit—The Lawyers' Clause of the Constitution, 45 Col. L.Rev. 1, 6 (1945). In 1777 the Articles of Confederation included a full faith and credit requirement applicable to judicial proceedings. In 1787 that clause was broadened in the Constitution itself to apply to all public Acts, Records and judicial Proceedings of each state. During that era the English rule was virtually unknown and was not established in the states. Hence the contention that the English rule must be read into the Full Faith and Credit Clause must fail on this ground alone. It would be—it was—most incongruous that this Clause, intended "to form a more perfect Union" should be cast aside in favor of an English common law doctrine antithetical to this Union.

In any event, a common law rule contrary to the letter and the spirit of a constitutional command must not be read into it, absent strong evidence of such intent

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Footnote continued—

1980 Ariz. St. L.J. 1, 48; Weintraub, Commentary on the Conflict of Laws, Sec. 9.2B, p. 517 (2d ed. 1980); Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 421 (1980).

See also, *Ferens v. Deere & Co.*, 819 F.2d 423 (1987), certiorari pending, No. 87-477.

on the part of those drafting and ratifying the Constitution. There exists no such evidence.[2]

The growing realization that the common law conflicts-limitations rule is wrong lends urgent impetus to the need to reconsider the holdings of *M'Elmoyle* and *Wells,* since the common law rule controlled what little constitutional analysis those opinions contain. The long failure to re-examine *M'Elmoyle's* acceptance of the common law fiction that limitations laws affect the "remedy" but not the "right", has resulted from the acceptance of a verbal formula which became sanctified as legal dogma. The problems and evils wrought by adherence to this shopworn shibboleth have become more evident in our present era of burgeoning commercial litigation, instant communication and rapid travel. This is why *Ferens v. Deere & Co.*, 819 F.2d 423 (3rd Cir. 1987), refused to countenance this fiction any longer.

Only recently, therefore, has the problem been addressed. Only recently have demands for reform and change been pressed. The realization that limitations laws are indeed substantive has led judges, lawyers and scholars to urge change in every available way, as in the Uniform Conflict of Laws—Limitations Act, and in proposed revisions to Section 142 of Restatement (Second) of Conflict of Laws. Even England in 1984 changed its common law—the law responsible for our present problem—to treat limitations laws as substantive. [Sun's Brief, pp. 27-32, notes 12, 14, 16].

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2. Jackson, Full Faith and Credit—The Lawyers' Clause of the Constitution, 45 Col. L.Rev. 1, 3-6 (1945); Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709, 710 (1983); Peilemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 So. Calif. L.Rev. 1299, 1302 (1987); III Papers of Madison 1449, 1480-81 (1840).

Once it is determined, however, that limitations laws are primarily substantive, as reason dictates and scholars agree, the solution to the problem merely requires application of our Constitution as written, according to its purpose from the beginning.

B. The "Outcome-Determinative" Test Reinforces the Classification of Limitations Laws As Substantive for Constitutional Purposes

The primary purpose of limitations statutes is "undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, . . ." Developments in the Law. Statutes of Limitations, 63 Harv. L.Rev. 1177, 1185 (1950).

This primary purpose of repose is reflected in the fact that limitations is an affirmative defense to be invoked by a defendant for its own benefit. From Blackstone's age to the present, only the litigant could plead the statute of limitations in bar. For example, to a complaint on a promise, defendant could plead that "he made no such promise within six years; which is an effectual bar to the complaint." III Blackstone, Commentaries on the Laws of England, 308 (1765-1769) (2 Chitty's Blackstone 246; N.Y. 1832). 51 Am.Jur.2d, Limitation of Actions, Sec. 453, p. 914. Justice Story himself observed that the then recent common law conflicts cases had failed to consider the important factor that a limitations defense is "authorized to be made by the debtor and at his option". For this reason as well, he said, a limitations defense should be no different from any other legal defense. He "could perceive no reason why the right to use that defence, good by his own laws, should not travel

with the debtor into every other country." Only because the error of the contrary rule was "too strongly engrafted" did he so rule, against his own reason and judgment. *Le Roy v. Crowninshield*, 15 F.Cas. at 368, 369.

The English conflicts rule, first adopted on this continent years after our Constitution was ratified, was then applied in a constitutional case to negate the Full Faith and Credit Clause, in *M'Elmoyle v. Cohen*, 13 Pet. 312 (1839). The "historical accident" whereby the parochial English rule separated "right" from "remedy", led to the erroneous correlation of "procedure" with "remedy" and the ensuing failure of courts to classify limitations laws as substantive. Leflar, The New Conflicts-Limitations Act, 35 Mercer L.Rev. 461, 473 (1984). The technical terminology of common law writs as to forms of action and "remedies" stifled logical analysis. Developments in the Law: Statutes of Limitations, 63 Harv. L.Rev. at 1187 (1950). Cases involving limitations conflicts questions, therefore, historically failed to analyze the substantive nature of limitations laws. Rote acceptance of legal dogma became an easy substitute for realistic analysis.

Now that our jurisprudence has long since disenthralled itself of common law technicalities, it can dispense with these "unsatisfactory rationalizations". *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). With this history behind us, we have a more objective overview of the constitutional problem and its solution. Being free of arbitrary dogma, courts can better analyze the true nature of limitations laws, so as to anchor our Constitution's operation in the bedrock of reality. When so viewed, the substantive nature of the limitations de-

fense as intending to grant repose cannot fairly be disputed. Leflar, The New Conflicts-Limitations Act, 35 Mercer L.Rev. 461, 469 (1984); Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L.J., 405, 420 (1980); Fischer, The Limits of Statutes of Limitation, 16 Southwestern Univ. L.Rev. 1, 32 (1986).

The injustice inherent in failure to apply the limitations law of another state where the claim arose led to the enactment of "borrowing" statutes by many states, requiring those limitations laws to be applied, in some circumstances, by the forum. But the inconsistency and confusion caused by this "unruly assemblage of statutes and their uncertain interpretation" only added to the problem. Leflar, The New Conflicts-Limitations Act, 35 Mercer L.Rev. 461, 463-4. Grossman, Statutes of Limitations and Conflict of Laws: Modern Analysis, 1980 Ariz. St. L.J. 1, 14-15. The vacuum left by *M'Elmoyle's* failure to apply the Full Faith and Credit Clause to the substantive limitations issue, led to these ineffective attempts by states to address what should have been a federal constitutional solution.

The irrationality of the common law rule that a right could exist without a remedy, which led to equating remedy with procedure, also led courts to make exceptions concerning "built-in" limitations statutes by calling them "substantive" for conflicts purposes, even though their function as statutes of repose was the same. Leflar, Id., at p. 462.[3]

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3. Similarly, contractual limitations provisions, otherwise valid, have no significant substantive difference from limitations statutes. Their operation is merely confined to a given contract. Martin, Statutes of Limitation and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 416-17 (1980), discussing *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

Yet respondents and *amicus curiae* Goad ignore these reasons, these purposes, and this history. They assume ipso facto the procedural nature of limitations laws, perpetuating the obvious fiction without rhyme or reason. Then they argue that any procedural law may on occasion be "outcome-determinative", thereby invalidating this test for constitutional purposes even though the law may be substantive. Their argument, of course, entirely by-passes the point made in Sun's brief. Limitations laws are not procedural rules governing how an action may be commenced and maintained, nor determining which of several remedies may be available in granting legal relief. They determine whether a claim can be maintained, or cannot be maintained, when invoked by a litigant. They a. for the purpose of "wiping the slate clean", to grant repose to the litigant. They are either a defense to the claim, or they are not. In either instance they are outcome-determinative in barring, or not barring, the action. These are indisputable reasons requiring limitations laws to be classified as substantive.

Yet *amicus curiae* Goad, ignoring these compelling reasons, indulges in more faulty logic. Stripped of pretense, the argument is that a procedural noncompliance may be outcome-determinative in a given case. (Brief, 11-12). If limitations laws are outcome-determinative, it is inferred, they are also procedural. But this false syllogism is bereft of all meaning. On that premise, any substantive law which is outcome-determinative would also be considered to be procedural.

The conclusion in *Goad v. Celotex Corporation*, 831 F.2d 508 (4th Cir. 1987), certiorari pending No. 87-1163, that limitations laws are primarily for efficient "court management" and only incidentally for "repose", is un-

sound. *Goad's* reliance on *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945) is misplaced. *Chase* held that a state could lengthen its own limitations law without violating due process. It described limitations statutes as sparing courts from litigating "stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." Cited in support of this purpose was *Order of R. Telegraphers v. Railway Exp. Agency,* 321 U.S. 342, 348-49 (1944), which described the limitations statute's "conclusive effects . . . designed to promote justice" by preventing surprises and giving timely notice to litigants. These are plainly purposes of "conclusive" repose for the litigant.

Nowhere in the cases or literature has anyone attempted to show how a court would be adversely affected in its procedure by applying another state's different limitations law. It is the claim of the litigant which is always directly affected. Thus policies affecting the viability of that claim are necessarily substantive in nature. If a state, therefore, has no interest affecting that claim other than adjudicating it in court, the forum state may not constitutionally apply its own different limitations law.

C. Whether the Forum State May Constitutionally Apply Its "Discovery Rule" When the Action Is Barred by Limitations in the State Where the Claim Arose Is Not Presented for Decision in This Case

Amicus curiae Goad argues that if the Constitution requires forum states to apply limitations laws as being substantive in nature, an exception should be made where the forum state has a "discovery rule", but the state whose substantive law applies does not. This argument

centers on the "unfairness" exception or "escape clause" contained in Section 4 of the Uniform Conflict of Laws—Limitations Act, 12 U.L.A. 50 (1987 Supp.).

The conclusion of the Committee approving the Uniform Act was that limitations laws are substantive and should be so treated in deciding conflict of laws issues. Under Section 2, the limitations law of the state whose substantive law governs is to be applied, whether shorter or longer than the forum state. By a narrow vote, the "unfairness" exception in Section 4 was retained in the Uniform Act. This vague exception would benefit a claimant who could not reasonably have known of his claim before the limitations period had expired in the state where his claim arose, or in certain tolling situations. Leflar, The New Conflicts-Limitations Act, 35 Mercer L.Rev. 461, 479-80 (1984).

The Uniform Conflict of Laws—Limitations Act superseded the earlier Uniform Statute of Limitations on Foreign Claims Act (1957). The latter Act would have applied either the limitations law of the place where the claim accrued, or that of the forum, whichever was shorter. This was found to be unsatisfactory, and was not considered a "sound solution to the choice of law problem. . . ." Leflar, Id., at 464-465. But all these laudable efforts aimed at legal reform were but continuing attempts to fill the constitutional void in this area of law created by the old *M'Elmoyle* rule. Hence the history of the Uniform Act confirms the near universal judgment of legal scholars and judges that limitations laws are indeed substantive in nature.

Once we conclude that limitations laws are substantive, the constitutional consequences follow because such

laws significantly affect people's legal rights. What exceptions the Uniform Act may have made are not pertinent to the constitutional issue, unless they address a constitutional concern.

In our federal Union, each state is entitled to enact and apply substantive laws governing events occurring in that state, in any way that is constitutionally valid. It follows that the forum state must, as a general rule, give full faith and credit to the limitations laws of the state whose substantive law is found to be applicable. If those limitations laws are so "unfair" or otherwise defective, as to be unconstitutional under the Due Process Clause or the Equal Protection Clause, the solution is to grant the relief that the Constitution requires in that individual case. The solution is not to apply the law of the forum state in order to avoid a more stringent, but valid, law of another state.

The present case does not involve a "discovery" issue, nor any similar issue of "unfairness". There is no reason now to address or decide the specific question raised by Goad.

II. Texas, Oklahoma, and Louisiana Laws Governing Liability for Interest, and the Period of Limitations, Differ From Kansas Laws Applied Below

A. The Court Below Did Not Apply the Substantive Interest Laws of Texas, Oklahoma and Louisiana, As Required by Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)

After having been directed by this Court's remand (474 U.S. 806) to apply the applicable laws of other states to class members' claims arising in those states, the Kansas

court has failed to do so. Instead, Kansas has ventured to predict that the other states would adopt the Kansas theory, and has again exported its own peculiar version of interest law. This case, therefore, presents the opportunity to articulate a standard under which courts must heed and apply the Full Faith and Credit constitutional command.

In the past, the Clause has been weakened by questions whether it was self-executing, whether it meant anything other than what Congress might provide by legislation, and whether it applied to a state's common law laid down in judicial decisions, as well as to judgments and public acts. While these questions have been resolved, this legal history combined with deficient "private advocacy" have resulted in lack of clarity and strength in court decisions. Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L.Rev. 1, 7-17, 33-34 (1945). We can only join the calls of Justice Jackson, and of other scholars on this subject, for doctrinal clarification and strengthening of the Full Faith and Credit Clause, to better implement its purpose. Hay, Full Faith and Credit and Federalism in Choice of Law, 34 Mercer L.Rev. 709 (1983); Pielemeier, Why We Should Worry About Full Faith and Credit to Laws, 60 So. Calif. L.Rev. 1299 (1987); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L.Rev. 185 (1976).[4]

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4. Constitution of the United States, Article IV, Sec. 1 contains the proviso that ". . . Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

That proviso authorized Congress to enact uniform evidentiary methods for proving state laws, thereby preventing the danger that a state's procedural or evidentiary rules might lead to evasion of the Full Faith and Credit Clause. Ironically,

(Continued on following page)

In *Phillips Petroleum Co. v. Shutts*, this Court directed Kansas to apply the laws of Texas, Oklahoma and Louisiana to the class action claims for interest; and remanded this case for that purpose. (474 U.S. 806). Yet Kansas proceeded to ignore the existing laws of those states by predicting that those states would be enlightened enough to adopt the Kansas theory.

It is Sun's position that Kansas must, under our Constitution, apply the existing law of another state as it is found. Kansas is not entitled to change the existing law of another state, under the guise that it is merely construing and applying that law. If Kansas is allowed to disregard the Full Faith and Credit Clause, and Due Process Clause, in that manner, it will remain free for each state to evade the constitutional command with impunity. A brief look at how Kansas exported its own unorthodox theory of interest law proves the need to formulate and enunciate a test requiring constitutional compliance.

Notwithstanding this Court's recognition that ". . . Texas has never awarded any such interest at a rate greater than 6% . . ." (472 U.S. at 817), the Kansas Supreme Court again on remand applied the Kansas theory of interest which adopts the interest rate found in an inapplicable federal regulation, as it had before. Sun's

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Footnote continued—

that proviso led to unwarranted doubts, questioning whether the Clause was self-executing without congressional action; thus weakening the impact of the Clause. The Articles of Confederation in 1777 required full faith and credit to be given to court records and proceedings. In 1787, the Constitutional Clause was enlarged to include a state's other public acts and records, and Congress was given power to prescribe the manner in which such laws should be proved. The purpose was to strengthen the requirement, not to weaken it.

brief demonstrates that the Texas Supreme Court applied the Texas statutory and state constitutional 6% rate in its identical *Stahl* case, with full knowledge of the higher federal rate, and with full knowledge of Kansas' different theory utilizing the federal rate.

Respondents are unable to answer Sun's summary of the Texas judicial record in its royalty interest cases, preferring instead to quote from inapplicable personal injury cases. Respondents then lamely claim that Sun's federally filed FPC undertaking to refund excess gas prices to its pipeline purchasers, with interest, mysteriously became a contract between Sun and its royalty owners (over whom the federal commission exercised no jurisdiction). It is thus contended that Texas would enforce this "contract" to pay a higher rate of interest. But the lower court, at least, recognized that the only basis for recovery in any state was under unjust enrichment "equitable principles," not on a written contract. (*Shutts*, supra, 732 P.2d at 1290, 1294; 679 P.2d at 1175; 567 P.2d at 1319, 1321) (*Wortman*, supra, J.A. 119, 150).

In advocating a new theory of recovery, respondents are merely grasping for non-existent support for the lower court's refusal to follow Texas law. Neither can respondents find support for the lower court's similar export of the Kansas theory to Oklahoma and Louisiana. (Sun Brief, p. 38). The truth is that the Kansas theory, adopting inapplicable federal interest rates as state law, is based entirely on the lower court's notions of "equity." It is an unorthodox theory unsupported by statutes or cases in other states. Whatever its equitable merit, however, each state is entitled to promulgate its own laws. Kansas cannot constitutionally export its theory so as to govern class members' interest claims arising in other states.

B. The Limitations Laws of Texas, Oklahoma and Louisiana Bar Interest Claims Related to Sun's 1976 Payout More Than Three Years Prior to Suit

Respondents are also forced to grasp at straws in their argument contending that the limitations laws of Texas and Oklahoma do not bar claims arising in those states. (Respondents concede that Louisiana law bars such claims). They erroneously state that interest, awarded on the basis of unjust enrichment "equitable principles," is instead based upon written contracts requiring interest.

The plaintiff class members were subject to written oil and gas leases requiring Sun to pay a 1/8th royalty on gas sales. But the leases contained no provision, express or implied, for interest. The interest award was based on the equitable doctrine of unjust enrichment, which, until this case, was subject to the three year Kansas limitations staut-ute.

Recognizing this impediment to denying Sun's limitations defense, the Kansas court, sua sponte, developed a new theory of Kansas limitations law avoiding its three year limitations for such equitable actions, based on another common law fiction. (690 P.2d at 391, J.A. 122). In calculating unpaid interest accruing on principal already paid, the so-called "United States Rule" allows the unpaid interest amount as of date of payout, also to draw interest until date of judgment. To avoid the common law rule forbidding compounding of interest (interest on interest), the Rule as stated treats the debtor's payment of principal as being partly for the accrued interest as of that date, so that interest may then continue to accrue on the unpaid "principal" balance.

Despite respondents' petition seeking only interest, and alleging prior payment of principal; and despite a stipulation to that effect in the pretrial order (J.A. 7, 50-51), the Kansas court cited the foregoing fiction as a basis for saying that the suit was for "principal" royalty amounts required to be paid by the written lease. Using this fiction, it applied the Kansas five year statute applicable to written contracts. (*Wortman v. Sun Oil Co.*, 690 P.2d at 391, J.A. 122).

Conceding that Kansas has the constitutional right to use a fictional formula to turn suits for equitable interest into suits for royalty principal long since paid, Kansas has no right to export this medieval magic into the law of other states. Texas does not indulge in the Kansas fiction that interest is principal. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 488 (Tex. S.Ct. 1978), ruled that interest is properly calculated on interest. It held there was no need to indulge in an irrelevant fiction of this kind, i.e., that interest is principal. In Texas, there is not the slightest pretense for applying a limitations statute applicable to written contracts to the interest claims in this case. Accordingly, the two year Texas limitations statute is applicable. (Sun Brief, p. 7).

Nor could any court, we suppose, rationally hold that Oklahoma would adopt the Kansas theory treating an equitable suit for interest, after the principal debt was paid in full, as a suit for principal owing under a written contract. Oklahoma's three year limitations statute bars the interest claims arising therein, related to Sun's 1976 payout. *Filtsch v. Johnson*, 174 Okl. 132, 50 P.2d 138 (1935) (action for rent); *Flanagan v. Campbell*, 183 Okl. 610, 83 P.2d 865 (1938) (action for royalty oil); *T & S Inv. Co. v. Coury*, 593 P.2d 503 (Okl. 1979) (quasi-contract).

The unorthodox theories adopted by Kansas for its own purposes and for its own reasons, relating to interest liability and limitations laws, are vivid examples of laws created by "magnet states", drawing to themselves nationwide litigation in a given area of law. Arthur R. Miller and David Crump, Jurisdiction and Choice of Law in Multistate Class Actions After *Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986).[5] Unless protected by the Full Faith and Credit Clause and the Due Process Clause, litigants' substantive rights will be determined by the fortuitous laws of states who have no legitimate interest in the disputes. And each state having laws considered favorable for one class or group of citizens will become a litigation haven where local state courts create and apply "national" law. Our Constitution was meant to prevent that result.

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5. Another example is the lower court's construction of the Kansas limitations "borrowing" statute which adopts the shorter limitations act of the state where the cause of action arose. Kansas holds its "borrowing" statute inapplicable in this class action because the "cause of action arose in Kansas as well as in Texas, Oklahoma, Louisiana, New Mexico, and Mississippi." (J.A. 157). Treating many individual claims from many states as one cause of action arising in Kansas vividly demonstrates that state's intent to apply its own law to claims arising elsewhere.

CONCLUSION

Kansas has again, after prior remand by this Court, avoided applying substantive laws of Texas, Oklahoma and Louisiana to the claims arising in each of those states.[6] In order to insure compliance with the Constitution, it becomes necessary for this Court to examine those laws in laying down a test which each state may use as a guide in enforcing the constitutional command.

In this particular case, another general remand requiring the lower court to consider again the substantive laws of the interested states is not enough. The Kansas court should be directed to enter judgment for Sun as requested in the Conclusion to its Brief.

Respectfully submitted,

GERALD SAWATZKY*
JIM H. GOERING
TIMOTHY B. MUSTAINE
FOULSTON, SIEFKIN, POWERS & EBERHARDT
700 Fourth Financial Center
Wichita, Kansas 67202
(316) 267-6371

- and -

EDWYN R. SHERWOOD
P.O. Box 2880
Dallas, Texas 75221-2880
(214) 890-5608

Attorneys for Petitioner

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*Counsel of Record

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6. Because the claims arising in Mississippi and New Mexico are *de minimis*, Sun disregards them in this Court.

FOR ARGUMENT

No. 87-352

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds of royalties pursuant to FPC Opinions or FERC,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF OF RESPONDENTS

W. LUKE CHAPIN
Counsel of Record
GORDON PENNY
CHAPIN & PENNY
124 East Kansas
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

STEPHEN JONES
JONES & JENNINGS
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF OF RESPONDENTS

A part of the controversy in this case relates to what rate of interest is allowed in contract cases in Texas. The sole purpose of the Supplemental Brief is to inform the Court of a February 10, 1988 decision of the Texas Supreme Court on this subject.

In *Perry Roofing Company v. Eugene D. Olcott,* No. C-6228 (available on Lexis), decided February 10, 1988, the Texas Supreme Court distinguished *Mo.-Kan.-Tex. R. Co. v. Fiberglass Insul.,* 701 S.W.2d 943 (Tex. Civ. App. 1986), relied upon by petitioner.

In *Perry,* the Texas Supreme Court held that the rule of *Cavnar v. Quality Control Parking, Inc.,* 696 S.W.2d

549, does extend to breaches of contract for ascertainable damages.

Thus, *Mo.-Kan.-Tex. R. Co.* has no application to the Texas interest rate question in this case.

Respectfully submitted,

W. LUKE CHAPIN
Counsel of Record
GORDON PENNY
CHAPIN & PENNY
124 East Kansas
P. O. Box 148
Medicine Lodge, Kansas 67104
(316) 886-5611

STEPHEN JONES
JONES & JENNINGS
Broadway Tower, Suite 1100
P. O. Box 472
Enid, Oklahoma 73702
Attorneys for Respondents

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Respondents.

On Writ of Certiorari To the Supreme Court of Kansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE, OF WILEY GOAD IN SUPPORT OF RESPONDENTS

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

BRENT M. ROSENTHAL*
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

Attorneys for Amicus Curiae
WILEY GOAD

January 19, 1988

* Counsel of Record

NO. 87-352

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

SUN OIL COMPANY,

Petitioner,

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Respondents.

MOTION OF WILEY GOAD FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

Wiley Goad respectfully moves for leave to file a brief *amicus curiae* in support of Respondents. Respondents have consented to the filing of such a brief. Petitioner has not.

Wiley Goad is a plaintiff in a tort action for damages and the winning party in a case in which the Fourth Circuit rejected constitutional arguments similar to those made by Petitioner in the present case. *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987). If Petitioner were to prevail here, Goad's victory in the Fourth Circuit would be jeopardized.

Wiley Goad was an asbestos insulation worker for more than 20 years. In 1981 he learned that he had developed progressive and irreversible asbestos lung disease as a result of his work. Six months after the initial diagnosis, Goad filed suit against several manufacturers and distributors of asbestos in the United States District Court for the Eastern District of Texas. Personal jurisdiction over defendants in that district was uncontested and venue was proper. Although no defendant is a Virginia corporation or has a plant or principal place of business there, Goad's suit was transferred, on motion by defendants under 28 U.S.C. §1404(a), to the Western District of Virginia, where he and the physicians who treated him reside.

It was agreed that the transferee court was obliged to apply the law which the federal court in Texas would have applied, and that the Texas rule on choice of law called for application of the Texas statute of limitations. Texas follows the "discovery rule," under which the limitations period does not begin to run until a plaintiff has learned of his injury and its cause. Defendants argued, however, that it would be unconstitutional for Texas to apply its limitations rules to a case for which, it was said, Virginia law provided the substantive rules. Virginia did not adopt a discovery rule until 1985, it is unclear whether that rule has retroactive application, and arguably Goad's claim would have been barred by the Virginia limitations rules as they were when Goad incurred his diseases. The District Court and the Fourth Circuit both rejected defendants' arguments, holding that neither the Due Process Clause nor the Full Faith and Credit Clause forbade application of the Texas limitations rules or required application of those of Virginia.

Under the Fourth Circuit's decision, Wiley Goad is able to seek tort compensation from the manufacturers of asbestos products for his disease. If, however, this Court were to

adopt the constitutional *lex loci delicti* rule for statutes of limitations urged by Petitioner Sun Oil and *amicus* GAF in this case, Goad would lose that right.

The facts of Goad's case are far different from those in the case of the Wortmans. Goad seeks leave to file a brief *amicus* so that this Court, in deciding whether to adopt the sweeping constitutional rule urged by Sun Oil, may have in mind the variety of kinds of cases to which that rule would apply. In addition, Goad will argue that even if the Constitution imposes limits on the use by a forum state of its own statute of limitations, those limits are not as draconian as Sun Oil contends and any constitutional rule would not bar the forum state from applying its discovery rule on facts such as those in Goad's case.

Respectfully submitted,

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

Brent M. Rosenthal per e

BRENT M. ROSENTHAL *
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

January 19, 1988

*Counsel of Record

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NO. 87-352

IN THE
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Respondents.

BRIEF FOR WILEY GOAD AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Wiley Goad is set forth in his motion for leave to file this brief *amicus curiae* in support of Respondents, Richard and Hazel Wortman.

SUMMARY OF ARGUMENT

Petitioner Sun Oil argues that the Constitution requires the forum to apply the statute of limitations of the state "where the claim arose and claimant resides," (Brief for

Petitioner at 13), thus urging the Court to adopt as a constitutional principle the long-abandoned conflicts-of-law rule of *lex loci delicti*. *Amicus curiae* GAF contends that because the choice of which statute of limitations to apply is potentially "outcome-determinative," the Constitution prohibits the automatic application of the forum's limitations provision. Both urge that constitutional restrictions on a state's decision to apply its own statute of limitations in its courts will promote the expectations of the states and the parties, and will discourage the "evil" of forum-shopping.

Amicus curiae Wiley Goad submits in response that the forum's choice of its statute of limitations generally is not subject to constitutional scrutiny, because such statutes are usually procedural rather than substantive and are not intended by sister states to be applied in cases outside their courts. This Court has acknowledged the traditional rule that statutes of limitations are matters of remedy rather than of right, and do not create vested rights in a defendant. Neither states nor defendants have any legitimate expectation that the procedural statute of limitations of the state whose substantive law is selected by a foreign forum will be applied by that forum. Thus, neither the Full Faith and Credit Clause nor the Due Process Clause prohibits a forum from applying its own statute of limitations to a case properly within its jurisdiction. No sister state interests or expectations are impaired, and no defendant can have a protected interest in time-bar insulation or can even expect that such insulation exists.

Amicus Goad further submits that if this Court should hold that a state's statute of limitations choice is subject to constitutional scrutiny, an "outcome-determinative" formula must nonetheless be rejected. Rather, any constitutional appraisal of limitations choices should be guided by reference to the interests addressed by statutes of limitations and the purposes they seek to effectuate.

Finally, to whatever extent constitutional review should go beyond the forum interests reflected in statutes of limitations to an assessment of "fairness" to the parties, Goad suggests that the principle that claims should not be barred before they can be brought should be given paramount importance. Accordingly, a forum's decision to apply its own "discovery rule" limitations period should never be held unconstitutional.

ARGUMENT

The details of why, in our submission, the position of Petitioner is unsound and Respondents ought to prevail in this Court, are set out below. Before going into detail, however, it is useful to identify two matters that loom large over this case.

What Sun Oil is seeking in this case is truly breathtaking. Its view, if adopted, would turn somersaults with two fundamental principles of American government. First, Sun Oil seeks to have this Court impose a rigid constitutional limit on the freedom of states to decide for themselves what rule of conflict of laws they will follow with regard to statutes of limitations. Second, Sun Oil seeks to denigrate, with the opprobrious term "forum-shopping," the freedom of states to make their own choices on many legal matters and of litigants to take those choices into account in determining where to bring suit.

Until very recently it was universally understood to be the law that a forum state could and ordinarily would apply its own statute of limitations to a case that arose elsewhere, whether the effect of this was to bar a suit that was still timely somewhere else or to allow a suit that would be barred by limitations in the other jurisdiction. This Court has repeatedly held that the Constitution of the United States

permits states to follow that practice. Some conflicts scholars were and are critical of that traditional view. In the last 15 years a few states have followed the lead of the academics and have held, as a matter of their local doctrine of conflict of laws, that there are circumstances in which they would not apply their own statute of limitations, but would look instead to the limitations rule of the state where the claim arose, the state whose substantive law governs the action or the state with the most significant relationship to the parties and to the occurrence.

Petitioner does not and cannot argue here that Kansas ought to join those states that have chosen to adopt the new view. Only the Kansas Supreme Court or the Kansas legislature can make that choice. Instead Sun Oil makes the only argument open to it here. It contends that the Due Process and Full Faith and Credit Clauses require the forum state to apply the limitations provision of the state where the claim arose and the claimant resides. That to so hold would require this Court to overrule an unbroken line of decisions going from *M'Elmoyle v. Cohen*, (39 U.S.) 13 Pet. 312 (1839), to *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953), does not deter Sun Oil, which sees this as a small price to pay to achieve what it considers "a consistent, realistic framework for constitutional law." (Brief for Petitioner at 13.)

The logic of Petitioner's position requires it to leave behind even the scholars whose view it purports to espouse. Even the scholars who are unhappy with the traditional view of statutes of limitations in conflict of laws do not urge as rigid or as sweeping a rule as Sun Oil and GAF now expound. And the scholars, and the lower courts that have followed them, have argued for change on the ground that it is analytically sound, not that it is constitutionally mandated.

The history of archeology is replete with the unearthing of riches buried for centuries. The archeological discovery of a new, revolutionary meaning in the Constitution of the United States is quite uncommon. The presumption is powerful that the far-reaching, dislocating construction of the Constitution now urged by Petitioner was not uncovered by judges, lawyers, or scholars in the past 197 years because it is not there.

Since neither the text of the Constitution nor the construction that has uniformly been given it lends the slightest support to Petitioner's argument, it falls back on a jurisprudence of epithets. This new constitutional rule, so it is said, is necessary to prevent "forum-shopping." This phrase (or its equivalent in verb form) is used 11 times in Petitioner's Brief and 11 more times in the brief of its friend, GAF. But as Judge Seitz observed in his dissent in *Ferens v. Deere & Co.*, 819 F.2d 423, 428 (3d Cir. 1987), whether something imvolves "unfair forum-shipping" or "skillful lawyering within established rules to obtain favorable law" is a matter of perspective.

This Court has been rightly concerned about forum-shopping between state and federal courts. *Hanna v. Plumer*, 380 U.S. 460, 467-468 (1965). The creation of diversity jurisdiction was not designed to expand or diminish the rights enjoyed by litigants under state law. A federal court sitting in diversity is intended to be "only another court of the State," *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), and identity of result in state and federal courts is a principle "important to our federalism." 326 U.S. at 110.

Choice of forum among state courts does not implicate in any way the relationship between the states and the federal courts. So long as the states are left free to be 50 laboratories, they will have different rules on many matters.

It is the essence of a federal system that this should be so. That litigants should take account of these differences in choosing where to litigate has never been thought to be the "pernicious consequence" that Petitioner piously deplores. (Brief for Petitioner at 22-23.)

In *Van Dusen v. Barrack*, 376 U.S. 612 (1964), for example, the Court held that a transfer under 28 U.S.C. §1404(a) is "but a change of courtrooms" and does not change the law to be applied. 376 U.S. at 639. The statute, the Court said, "was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege." 376 U.S. at 635. Plaintiffs were to be allowed to retain "whatever advantages may flow from the state laws of the forum they have initially selected." 376 U.S. at 633.

More recently, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984), this Court saw nothing either unusual or deplorable in plaintiff's choice of an unlikely forum to gain the benefit of a procedural rule unavailable in states with a more significant connection to the litigation.

> Petitioner's successful search for a state with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly, Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.

See also *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) ("There is nothing inherently evil about forum-shopping."). People live in one state rather than another because they like its tax laws. They do business in a state with a favorable climate toward business. They choose a state as a place to litigate because of the advantages they think they will obtain from the rules followed by that state. All of these are incidents of our federalism, and are not "pernicious."

I. A STATE COURT'S DECISION TO APPLY ITS OWN STATUTE OF LIMITATIONS TO A CAUSE OF ACTION GOVERNED BY THE SUBSTANTIVE LAW OF ANOTHER STATE IS NOT SUBJECT TO CONSTITUTIONAL SCRUTINY UNLESS THE JURISDICTION WHOSE SUBSTANTIVE LAW CONTROLS HAS CHARACTERIZED ITS STATUTE OF LIMITATIONS AS SUBSTANTIVE.

A. The Issue of Whether a Forum's Choice of Law Is Subject to Constitutional Analysis Is Determined by Whether the Law Chosen Is Characterized by Applicable State Law as Substantive or Procedural, and Not by Whether Its Application Is Potentially Dispositive of the Litigation.

In the cases in which the Supreme Court has announced that the Full Faith and Credit Clause and Due Process Clause limit a state's choice of law, the Court has been careful to limit the constitutional review to choices of substantive law. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) (issue presented was whether "application of Kansas *substantive* law violated . . . constitutional limitations on

choice of law" (emphasis added)); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) ("Our sole function is to determine whether the Minnesota Supreme Court's choice of its own *substantive* law in this case exceeded federal constitutional limitations." (emphasis added)); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936) (Full Faith and Credit Clause compels application of a sister state's statute because that statute "enacts a rule of *substantive* law" (emphasis added)). The Court has thus recognized that while a state or a litigant may have a legitimate expectation that its liberty or property rights under substantive law will be protected by sister states, the forum is entitled to use whatever procedural rules it deems expedient to resolve the litigation. The Constitution, for example, does not govern a state's choice of rules of evidence, rules of service of process, rules of pleading, or rules of discovery. As long as procedural rules are applied equally, their application is not subject to constitutional scrutiny. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982). Simply because it is entertaining litigation, the forum state has a legitimate reason to apply its own procedural law to cases filed in its courts.

GAF argues that the "substance-procedure" distinction articulated in the Supreme Court cases should be abandoned, and that any choice of law that may be dispositive of the litigation should be subjected to constitutional scrutiny. This "outcome-determinative" test is required, GAF argues, because if the choice of a "procedural" rule could potentially dispose of the litigation, a litigant may have a constitutionally protected expectation in its application, even in foreign courts. The traditional distinction, GAF claims, encourages forum-shopping by plaintiffs among various state courts. GAF also contends that the outcome-determinative test is easier to apply and will produce more consistent results than the substance-procedure test.

GAF's proposal, however, fundamentally misconstrues the purpose of Full Faith and Credit and Due Process limitations on choice of law. The Constitution limits a state's choice of law not in order to guarantee a particular result, but rather to promote the legitimate expectations of the states and the parties. *Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 822. Although a particular procedural rule may be dispositive of a controversy, a litigant does not necessarily have a legitimate expectation that the rule will apply in another forum. For example, a rule of evidence or of joinder may be dispositive of an action, but the litigants do not have a reasonable expectation that such rules will be applied *in the forum state*. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964) (assuming that although Massachusetts substantive law applied, its rule on the plaintiffs' capacity to sue, which would terminate the action, would not apply to cases originally filed in Pennsylvania).

As was pointed out at pp. 5-7 of this Brief, forum-shopping between states is not something with which the federal Constitution is concerned. Should it, however, be viewed as a menace, the states themselves are quite able to regulate forum-shopping by use of the forum non conveniens tool. Several states have provided for forum non conveniens dismissals by statute. *See, e.g.*, Uniform Interstate and International Procedure Act §1.05 (inconvenient forum), 13 U.L.A. 355 (West 1986), showing adoption by six jurisdictions; Cal.Civ.Proc.Code §418.10 (West 1973); Wis.Stat. 262.19 (Supp. 1975). Numerous other states employ a judicially adopted doctrine.

Interestingly, the case most often cited as illustrating the evil consequences of forum-shopping. *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790 (10th Cir. 1979), would likely result in a different outcome today, because of the use of the forum non conveniens device by a state to eliminate litigation having little contact with the forum. In *Schreiber*,

plaintiff's claim arose in Kansas. Suit was filed in federal court in Mississippi within the Mississippi six-year statute of limitations but outside the Kansas two-year period. Since Mississippi would have applied its statute, that statute still governed when the case was transferred, pursuant to 28 U.S.C. §1404(a), to the Kansas federal court. Sun focuses upon *Schreiber* as an example of the perniciousness of forum-shopping at p. 23 of its Brief, and the case has received more than its share of academic criticism. *See, e.g.*, Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 Washburn L.J. 405, 406-09 (1980).[1]

Today, however, it is entirely possible that Mississippi would dismiss such a suit on forum non conveniens grounds, if the case in fact had no contacts with Mississippi. See *Shewbrooks v. AC & S, Inc.*, No. 56,014, _____ Miss. _____, _____ So2d _____ (Miss., Aug. 19, 1987) (upholding forum non conveniens dismissal). The point is that Mississippi has the *power* to regulate forum-shopping to its pleasure. States may thus easily combat this "evil" should they so perceive it: the federal Constitution does not speak to the matter, and there is no need for this Court to read into the Constitution a proscription against forum-shopping.

GAF urges the Court to adopt its outcome-determinative test, extrapolated from *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, (1938) and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), because it is easier to apply than a substance-procedure distinction. Whether a state regards its limitations period as

1. *Schreiber* apparently did not trouble the court that decided it, for shortly afterward the Tenth Circuit held that a forum's application of "its own statute of limitations rather than the limitations period of the forum giving rise to the cause of action does not violate due process." *In re South*, 689 F.2d 162, 166 n.5 (10th Cir. 1982) *cert. denied*, 460 U.S. 1069 (1983), citing *Allstate*, *supra*, and *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

"substantive" such that the state desires its application in proceedings in other states is, of course, easily ascertained. *See, e.g., Goad v. Celotex Corp., supra*, 831 F.2d at 511; *Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir. 1982), *opinion on suggestion for rehearing en banc*, 713 F.2d 100 (1983), *opinion after certified question answered*, 719 F.2d 785 (1983). See also *Chevron Oil Co. v. Huson*, 404 U.S. 97, 102 (1971) (recognizing distinction between procedural statutes of limitations and substantive statute of repose as a matter of ordinary conflicts law). Moreover, as discussed below, such an inquiry readily determines whether a sister state has any "interests" to which full faith and credit must be given, and whether a party might actually have "expected" application of the sister state's statute. In any event, the outcome-determinative test has long been superseded in *Erie* jurisprudence because it does not adequately recognize the nature of the federal judiciary as an independent system for administering justice.

Many matters are controlled by federal law in diversity cases because, while surely "outcome-determinative," they nonetheless touch on the fundamental ability of the federal judicial system to regulate litigation in federal courts. For instance, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), this Court held that the federal practice of allowing the jury to decide disputed fact questions raised by the assertion of a statutory employer defense controlled over the state rule requiring the trial judge to decide such questions. The Court explained that "were 'outcome' the only consideration, a strong case might appear for saying that the federal courts should follow the state practice." *Id.*, 356 U.S. at 536-37. But outcome was *not* the only consideration. "Affirmative countervailing considerations," in that case the federal system's distribution of trial duties between judge and jury, required that identity of outcome be sacrificed when the internal adminstrative powers of federal courts would be infringed. *Id.*, 356 U.S. at 537.

In short, "[o]utcome-determination analysis was never intended to serve as a talisman," *Hanna v. Plumer*, 380 U.S. 460, 466-67, because in a sense "*every* procedural variation is 'outcome-determinative'," *Id.* at 469. As the late Henry Hart observed, the difficulty with an outcome-determinative test is that it has "no readily apparant stopping place." Hart, *The Relations Between State and Federal Law*, 54 Col.L.Rev. 489, 512 (1954). Federal administrative interests may frequently demand results wholly inconsistent with the outcome-determinative approach. Sun Oil and GAF, nevertheless, would grant constitutional status to the approach for conflicts-of-law purposes—even though that approach no longer has resolving power in the very context in which it originated.

GAF has failed to demonstrate how abandonment of the principle that the Constitution limits choices of substantive but not procedural law, in favor of an outcome-determinative test, would promote the interests of federalism, fairness, or certainty of result. Having been interred for the purpose for which it was originally designed, the outcome-determinative test should not now be resurrected to govern the determination of which choice of law rules deserve constitutional scrutiny and which do not. This Court should retain the rule articulated in *Hague* and *Shutts* that a forum's choice of substantive, but not procedural, law is subject to the modest restrictions imposed by the Full Faith and Credit and Due Process Clauses of the federal Constitution.

B. Limitations Provisions Are Properly Characterized as Procedural Rather Than Substantive, Because They Are Intended To Serve Administrative Interests, and Do Not Confer Rights of Repose in Litigants.

As GAF notes, statutes of limitations have been characterized as "procedural" since medieval times. GAF Brief at 8.

This characterization of statutes of limitations as affecting the remedy and not the underlying right of action has been consistently reiterated by this Court. *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839); *Townsend v. Jemison*, 50 U.S. (9 How.) 407 (1850); *Campbell v. Holt*, 115 U.S. 620 (1885); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Although Sun Oil and GAF attempt to depict the principle that a statute of limitations affects the remedy and not the right of action as an abstraction unfounded on any policy or logic, this Court explained the basis for the distinction in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1949). In *Chase*, the defendant challenged on due process grounds a provision of the Minnesota Blue Sky Law that revived a cause of action that had expired under the applicable statute of limitations. The Court rejected the defendant's argument that the expiration of the limitations period provided the defendant with an enforceable, vested right to freedom from liability, and observed that limitations provisions are intended primarily to promote efficient court management by preventing the assertion of stale claims. 325 U.S. at 314. Under *Chase*, the repose enjoyed by defendants as a result of the application of limitations provisions is merely an "incidental benefit" of such statutes. *See Goad v. Celotex Corp.*, *supra*, 831 F.2d at 511. Since the defendant in *Chase* did not enjoy a "property" interest in the limitations bar, its removal by the Minnesota legislature did not deprive the defendant of any right protected by the Due Process Clause.

The Court's holding in *Chase* that access to a limitations bar is not a vested right subject to Due Process Clause protection formed the basis for a more recent Supreme Court opinion. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) the Court considered an Illinois ruling that the

failure of an administrative agency to hold a fact-finding hearing within 120 days of the filing of an administrative complaint for employment discrimination barred the claimant from pursuing any remedy. Citing *Chase*, the Court rejected the argument that the time limitation was a substantive condition upon the exercise of the underlying right. The Court distinguished between the "property right" in the employment discrimination claim possessed by the claimant and the corresponding lack of any substantive entitlement to the protection of the limitations period.

In *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) the Court quoted *Chase* at length in holding that even under the Equal Protection Clause of the Fourteenth Amendment, a litigant's right to assert a limitations defense is entitled to only minimal constitutional protection. 455 U.S. at 408. It is thus clear that the holding and reasoning of *Chase* that access to a limitations bar is not a substantive, constitutionally protected right, but is rather only a by-product of a procedural device intended to aid courts, remain valid today.

In addition to its recognition in Supreme Court precedent, the rule that limitations provisions do not provide defendants with vested, substantive rights is reflected throughout our jurisprudence. For example, both the First and Second Restatements of the Conflicts of Laws explicitly recognized that an action may be maintained in the forum if it is not barred by the limitations provisions of the forum, even if it is barred in the state where the cause of action arose. *Restatement (First) of the Conflict of Laws*, §§603, 604 (1934); *Restatement (Second) of the Conflict of Laws*, §§142, 143 (1969). Similarly, Comment *a* to the *Restatement (Second) of Judgments*, §49 (1980) explains that a limitations dismissal in one jurisdiction does not preclude, by res judicata, the maintenance of the same action in

another state if the second forum's limitations provision does not bar the action. Despite the criticism duly noted by Sun Oil and GAF in their Briefs, the American Law Institute has not disturbed the traditional rule that the statute of limitations of the forum applies to a cause of action arising in another state unless the foreign state deems its limitations provision substantive.[2] This rule, of course, reflects the fundamental distinction between the interests informing statutes of limitations and those animating merits rules, a distinction with equal significance in deciding the extent and nature of constitutional restrictions on choices of each kind of rule.

Numerous states have chosen to abandon the traditional rule through the enactment of borrowing statutes, *see, e.g.*, Fla. St. §95.10 (1982), or by judicial decree, *see, e.g., Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973). However, these borrowing provisions represent a policy

2. Sun Oil refers (Brief for Petitioner at 27 n.12) to the American Law Institute's consideration of a proposal to revise the traditional choice of law rule. The reference is misleading. Two separate proposals to revise §142 of *Restatement (Second) of the Conflict of Laws* have come before the membership of the American Law Institute. Both have been rejected. 54 U.S.L.W. 2597 (May 27, 1986); 55 U.S.L.W. 2653-54 (June 2, 1987). Still a third version will come to the Annual Meeting of the ALI in May, 1988. Whether it will prove acceptable to the Institute remains wholly speculative. All three versions, however, have two features that fly in the face of what Petitioner is contending for here. All three would allow a forum state to apply its own shorter limitations rule to bar an action that would be timely elsewhere and all three would recognize some circumstances in which the forum could apply its own longer statute to permit a suit that would be barred in the other state. In addition, it is worth noting that the ALI has been asked to consider various versions of what it is thought the conflicts rule ought to be. There has been no hint in any of these that the Constitution sets limits on a state's freedom to choose which limitations rule it will apply.

decision on the part of such states not to entertain litigation deemed stale by the state in which the cause of action arose. They do not imply recognition that a defendant in a claim arising in a foreign state enjoys a substantive right to repose conferred by the limitations provision of that state. *See, e.g., Warner v. Auberge Gray Rocks Inn , Ltee.*, 827 F.2d 938 (3rd Cir. 1987) (holding that, despite the borrowing rule adopted by the New Jersey Supreme Court in *Heavner, supra*, the New Jersey statute of limitations would apply to a cause of action arising in Quebec).

Any state desiring to confer upon potential defendants a vested, substantive right to repose from litigation based on a cause of action arising within its borders may do so simply by declaring its statute of limitations to have that effect. For example, in *Jenkins v. Armstrong World Indus., Inc.*, 643 F.Supp. 17 (D.Idaho 1985), *vacated on other grounds sub nom Meyers v. Armstrong World Indus., Inc.*, 820 F.2d 329 (9th Cir. 1987), a substantive right to repose *was* conferred upon the defendant by the Idaho statute of limitations; consequently, the trial court's decision to apply the Idaho limitations provision to a case originally filed in Texas was probably correct on that basis. Similarly, the result of *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), much maligned by GAF and Sun Oil in their Briefs, would have been different had Virginia chosen to endow the defendant with a vested right to repose by declaring its limitations provisions to be substantive. Sun Oil's real quarrel in this litigation is not with the Kansas Supreme Court; it is with the legislatures of Texas, Oklahoma, and Louisiana, for failing to provide litigants such as Sun Oil with a substantive right to repose on the type of claim presented in this case.

As noted in Part I(A) of this Brief, the labeling of a rule of law as "substantive" or "procedural" serves a very real purpose: it signals the significance of the interest affected

by the rule. The characterization of statutes of limitations as "procedural" is no accident; it represents a considered judgment of the significance of the statute to the litigants. By declaring their statutes to be "procedural" and not "substantive," Texas, Oklahoma, and Louisiana have made clear that the purpose of their limitations provisions is to protect their courts from stale claims, and not to provide defendants with a substantive right to repose that may be asserted in other states. The application by Kansas of its own limitations provision to the claims against Sun Oil, rather than of the procedural statutes of the various jurisdictions in which the claims arose, impaired no constitutionally protected right of Sun Oil and thus was constitutionally permissible.

C. The Application of the Forum's Statute of Limitations Does Not Impair Sister-State Interests in Violation of the Full Faith and Credit Clause.

As demonstrated in Part I(B) of this Brief, statutes of limitations are designed primarily to conserve judicial resources by relieving the forum state of the burden of entertaining cases that it considers stale. Neither Sun Oil nor GAF is able to articulate how the decision of the forum state that the facts of litigation arising in another state are not stale impairs any interest of the sister state. Indeed, by characterizing its statute of limitations as procedural, the sister state has declared and recognized that its statute need not and may not be applied beyond its borders. In the instant case, Texas, Oklahoma, and Louisiana have conflicts-of-laws rules regarding statutes of limitations similar to that in Kansas;[3] thus, interstate comity is completely unaffected by Kansas' application of the traditional rule.

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3. *Francis v. Herrin Transportation Co.*, 432 S.W.2d 710 (Tex. 1968); Okla.Stat.tit.12 §105 (1981) (directing application of limitations

On the other hand, were this Court to adopt the rule of *lex loci delicti* as a constitutional imperative with respect to statutes of limitations, as advocated by Sun Oil, the forum state's interest would be seriously impaired, because the forum state would be compelled to entertain actions arising in other states that it might otherwise dismiss as stale. Under Sun Oil's interpretation of the Full Faith and Credit Clause, the forum state could not determine for itself the point at which claims and evidence become too stale to litigate. For example, Louisiana, with a one year limitations provision applicable to personal injury claims,[4] would be required to entertain two-year-old actions from neighboring Texas,[5] four-year-old actions from neighboring Arkansas,[6] and six-year-old actions from neighboring Mississippi.[7] Limitations provisions would no longer serve the policy of effective court management in the states that enacted them. Such a result would truly impair state interests that the Full Faith and Credit Clause was designed to protect, and must be prevented by this Court.

Unless a state desires the application of its law in a proceeding in a sister state, and at the least signals such a desire, then the Full Faith and Credit Clause cannot ***require*** its application. Given the age and widespread acceptance of the traditional choice of law rule, states that characterize their

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3. (Continued) provision of state in which cause of action arose only if it is *longer* than Oklahoma's); *Istre v. Diamond M. Drilling Co.*, 226 So.2d 779, 794-99 (La.Ct.App. 1969)

4. La.Civ.Code Ann. art. 3536 (1953)

5. Tex.Civ.Prac. & Rem.Code §16.003 (1986)

6. Ark.Stat.Ann. §37-206 (1962)

7. Miss.Code.Ann. §15-1-49 (1972).

statutes of limitations as procedural cannot reasonably be said to desire the application of such statutes in foreign forums. Predictably, Sun Oil and GAF are unable to demonstrate such an intention on the part of Texas, Oklahoma, and Louisiana. The application of the forum's statute of limitations under these circumstances thus cannot be said to impair sister-state interests in violation of the Full Faith and Credit Clause.

D. The Application of the Forum's Statute of Limitations Does Not Defeat the Legitimate Expectations of Defendants in Violation of the Due Process Clause.

The Due Process Clause protects a litigant from a choice of law that is arbitrary or fundamentally unfair. *Allstate Ins. Co. v. Hague*, *supra*, 449 U.S. at 313. "When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co. v. Shutts*, *supra*, 472 U.S. at 822. Since the defendant does not have a vested right to invoke a limitations provision characterized as procedural by the state in which the cause of action arose, it cannot claim a legitimate expectation that the statute will be applied in a foreign state. Since the application of the traditional choice-of-law rule regarding statutes of limitations thus cannot conceivably be considered to violate any legitimate expectation of a defendant, it cannot be held to violate the Due Process Clause.

GAF's suggestion that a defendant has an interest protected by the Due Process Clause in the application of a particular statute of limitations is particularly troublesome in light of the frequent difficulties that the courts encounter in determining where a cause of action arose. For example, GAF is a defendant in several class-action lawsuits in which the plaintiffs seek to recover the cost of removing from their

buildings asbestos-containing materials manufactured by GAF and other companies. The cause of action may be said to arise where the buildings are located, or where the materials were manufactured, or where the materials were designed, or where the corporate decision to place the products on the market was finalized. GAF cannot legitimately claim to have developed an expectation in the application of the statute of limitations of any of these particular jurisdictions. In any event, it is inconceivable that GAF's conduct was influenced in any manner by the length of the statute of limitations in any of these states. *See, e.g., Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at 316. Thus, GAF's claim that it has developed a constitutionally protected expectation and interest in the application of a particular statute of limitations is purely contrived and fictional. In fact, the exact reverse is true: GAF has known since it first marketed asbestos products that it could be sued in a transitory cause of action for harms resulting from those products, and that the substance-procedure dichotomy would govern the choice of a limitations period. Similarly, Sun Oil has always known it could be sued in Kansas on a Texas oil and gas lease and be governed by the Kansas statute.[8]

This Court should not afford constitutional protection to "substantive" rights claimed by defendants that have not been conferred by state law. Defendants have been on notice of the traditional choice-of-law rule governing statutes of limitations for over 150 years; to claim surprise from the application of the rule is disingenuous at best. This Court should thus decline to allow defendants to claim entitlement to a particular state's limitations bar as a Due Process "right."

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8. The Kansas Supreme Court's treatment of the Kansas borrowing statute, a law which would seem on its face to dictate the result that Sun Oil seeks through this constitutional challenge, is, of course, outside the scope of this brief.

II. EVEN IF THE CONSTITUTION LIMITS THE FORUM'S CHOICE OF PROCEDURAL RULES, A FORUM'S CHOICE OF ITS STATUTE OF LIMITATIONS SHOULD ALMOST NEVER BE HELD UNCONSTITUTIONAL

A. Because Procedural Rules Are Designed to Protect Interests of the Forum, Constitutional Restrictions on Choices of Procedural Law Are Even More Modest than Constitutional Restrictions on Choices of Substantive Law.

As detailed above, *amicus* Wiley Goad believes that the Constitution does not speak to statutes of limitations. Should the Court hold, however, that a state's choice of a limitations period to control litigation properly in its courts is subject to constitutional scrutiny, the wooden rule suggested by Petitioner and *amicus* GAF must be rejected.

The constitutional review of a state's choice of "substantive" law–that is, the law affecting the parties' theories of liability, damage entitlements, and the like–is fundamentally different from the review, if any, of a state's choice of a limitations period. Statutes of limitations implicate interests of the forum *qua* forum, and are rules directed primarily toward judicial administration rather than toward the parties. Any constitutional strictures this Court places on statutes of limitations choices, therefore, should be much looser than the already "modest" restrictions governing choice of the law directed at the parties' interests. See *Shutts, supra*, 472 U.S. at 821.

As this Court has repeatedly recognized, see Part I above, statutes of limitations are, first and foremost, administrative expedients. The function of statutes of limitations as tools

for litigation management is reflected most significantly in the fact that this very nature makes them arbitrary and illogical:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay.

Chase Securities Corp. v. Donaldson, supra, 325 U.S. at 314.

Administrative tools that, by their very nature, operate without reference to the "justness" of a claim or the merits of the elements of a cause of action, should obviously be treated differently, for purposes of evaluating a forum's choice of rules, from the choice of rules shaping the merits of a case. The conflicts-of-law rule that Petitioner and *amicus* GAF would enshrine in the Constitution, however, lumps statutes of limitations into the same evaluative inquiry as merits issues. This approach ignores the fact that statutes of limitations are unrelated to the interests implicated and effectuated by rules governing merits issues.

This Court has explicitly rejected the mechanistic rule suggested by Sun Oil and GAF. In *Allstate, supra*, Justice Brennan noted for the plurality that even though the accident which killed plaintiff's decedent occurred in Wisconsin, defendant could not be sure that Wisconsin law would apply to a resulting lawsuit simply by virtue of the fact that the claim "arose" there. His opinion went on to confirm that a rigid test for governing law must yield to a test which is

sensitive to the nature of the different issues presented in a particular case:

> Such an expectation [that Wisconsin law would necessarily govern] would give controlling significance to the wooden lex loci delicti doctrine. While the place of the accident is a factor to be considered in choice-of-law analysis, to apply blindly the traditional, but now largely abandoned, doctrine, Silberman, supra, n.11, at 80, n.59; see n.11, supra, *would fail to distinguish between the relative importance of various legal issues involved in a lawsuit* as well as the relationship of other jurisdictions to the parties and the occurrence or transaction.

Id., 449 U.S. at 316 n.22 (plurality opinion) (emphasis added) (citing Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L.Rev. 33, 80 n.259 (1978)). Surely, then, an approach rejected for its failure to discriminate meaningfully among the merits issues in a case cannot be held to be constitutionally mandated for procedural matters, which implicate interests different from those informing merits rules.

B. Since Statutes of Limitations Primarily Implicate Forum Administrative Interests, a Forum's Application of Its Own Limitations Period Should Almost Never Be Held Unconstitutional

A defendant challenging the forum's selection of its own law on limitations bears the burden of establishing an infringement of the Full Faith and Credit Clause. *Alaska Packers Ass'n v. Industrial Accident Comm.*, 294 U.S. 532, 547-48 (1935); *Allstate, supra*, 449 U.S. at 325 n.13 (Stevens, J., concurring). This burden can almost never be met,

for while the forum has plain interests in regulating the litigation otherwise properly in its courts, a sister state will have no administrative interest in litigation outside its courts –regardless of whether *it* views the litigation as "stale." A state obviously takes no administrative interest in the conduct of litigation outside its courts.

Conversely, if the sister state's statute of limitations reflects substantive interests, e.g., repose rights, the sister state is easily capable of ensuring its application in foreign proceedings by declaring it to be substantive. As discussed above, this method has been followed for many decades. In the absence of such action, a state knows and expects that its statute will normally not be applied in other courts, for the obvious reason that the administrative considerations reflected in the statute are of concern only to the forum state.

The Due Process clause will prevent a forum's application of its own *substantive* law only if that application is arbitrary or fundamentally unfair. *Allstate*, *supra*, 449 U.S. at 313 (plurality opinion). Justice Stevens has questioned whether a "judge's decision to apply the law of his own State could ever be described as wholly irrational." *Allstate*, *supra*, 449 U.S. at 326 (Stevens, J., concurring). Forum administrative interests are sufficient to afford presumptive validity to the forum's selection of its own substantive law. *Id*.

Certainly then, there should be an even stronger presumption of validity to a forum's choice of its own limitations law. If administrative interests of the forum are normally sufficient constitutionally to support a choice of the law governing the rights and obligations of the parties, then surely those interests, which are at the heart of statutes of limitations, should validate the forum's use of its own limitations period.

Since it cannot be arbitrary for a forum to apply its own limitations provision, a defendant should have to demonstrate gross, fundamental unfairness in the use of that provision to invoke Due Process Clause relief. As previously demonstrated, concerns about "fairness" in the statute of limitations context are attenuated at best: a defendant has no vested right to the freedom from liability granted by a time bar, *Chase*, *supra*, and the purposes of statutes of limitations are in any event unrelated to the interests of the parties and the separation of just and unjust claims. Nonetheless, certain concerns may be raised about "fairness" in the choice of merits rules, and it is perhaps possible, though *amicus* Goad submits highly unlikely, that such concerns could call into question the forum's use of its own limitations law.

The *Chase* Court suggested that "special hardships or oppressive effects" might, if shown, require a different result. *Chase*, *supra*, 325 U.S. at 316. *Chase*, however, involved a defendant being subjected to new liability after coming within the protection of a time bar; such a situation is different from, and intuitively much more troubling than, a defendant failing to gain the protection of a time bar he never had for certain in the first place. In any event, the Court found no special hardships or effects, and tellingly noted also that the defendant could not legitimately claim to have premised its behavior on the protection of the time bar it possessed. *Id*., 325 U.S. at 316. Statements by defendants, such as *amicus* GAF, that they plan their actions under assumptions of time-bar protections they have never possessed obviously must be given even less credence.

In *Allstate*, *supra*, the Court wrote that "unfair surprise" is the "central concern" of Due Process review of choice-of-law decisions. *Id*., 449 U.S. at 327; see also *Shutts*, *supra*, 472 U.S. at 822 (when considering fairness in Due Process context, "an important element is the expectation of the

parties."). As detailed above, neither Sun Oil nor GAF nor any defendant in the usual case will be able to claim such surprise since defendants have always known they could be sued on transitory causes of action wherever jurisdiction and venue were proper and that the statute of limitations of the forum would likely govern.

In sum, a defendant bears an extremely heavy burden in gaining constitutional negation of the forum's application of its own statute of limitations. The Full Faith and Credit Clause will never be infringed, because a sister state has no interest in the docket management of the forum state; any substantive repose interests are readily given effect by the longstanding device of labeling the statute "substantive." A forum's choice of its own merits rules has presumptive validity under the Due Process Clause; a choice of the local statute of limitations, then, should be automatically approved. Fairness concerns are nonexistent since no defendant can claim surprise at a rule which GAF acknowledges originated in medieval times. Whatever the wisdom of the substance-procedure rule, there is simply no constitutional "unfairness" about its operation.

C. A Forum's Application of Its Own "Discovery Rule" Can Never Be Unconstitutional

Should this Court hold statutes of limitations subject to the same constitutional review as that applicable to merits issues, *amicus* Goad respectfully submits that at the very least, the outcome-determinative test profferred by Sun Oil and GAF should not apply to foreclose a forum's application of a limitations period containing a discovery rule.

Wiley Goad was a commercial asbestos insulator. He alleges that he developed asbestosis, and other irreversible diseases. These diseases manifested themselves long after his exposure

to asbestos ceased and long after the tortious acts he complains of were committed. Mr. Goad resides in Virginia, but filed suit for his injuries in Texas–where jurisdiction and venue were undisputed–to gain application of the Texas statute of limitations. At the time suit was filed, Texas law contained a "discovery rule" as part of its statute of limitations; Virginia law did not.

Discovery rules, of course, generally date the accrual of a cause of action from the moment a plaintiff knew or should have known of his injury. The rule is most frequently applied in cases where the injury is inherently unknowable until after the limitations period would normally run, such as medical malpractice or latent disease tort cases. *See, e.g., Urie v. Thompson*, 337 U.S. 163 (1949) (silicosis claim under the Federal Employers' Liability Act); *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155 (8th Cir. 1975) (asbestosis case under Minnesota law); *Louisville Trust Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497 (Ky. 1979) (mesothelioma caused by asbestos exposure). The vast majority of American jurisdictions now apply a statutory or judicial discovery rule to latent injury cases, and commentators overwhelmingly favor the doctrine. *See, e.g., Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 116 n.31, 117 n.32 (D.C. Cir. 1982).

If Due Process Clause appraisal of a forum's choice of its own limitations law ultimately turns on visceral notions of fairness–*amicus* Goad believes the inquiry ends long before such notions are reached–then Goad submits that a forum's application of a discovery rule will always be "fair" and hence constitutional. Affording a plaintiff a day in court, to sue for injuries inherently unknowable until perhaps decades after the tort occurs, is intuitively fair; indeed, it is the only fair resolution in the latent-injury context. *Urie v. Thompson, supra*, 337 U.S. at 169-170.

Dramatizing judicial recognition of the need for the discovery rule is the academic recognition that the latent injury context is one area in which it is unquestionably not unfair to apply the forum's statute. The recent Uniform Conflict of Laws–Limitations Act, 12 U.L.A. 50 (Supp. 1987), promulgated by the National Conference of Commissioners on Uniform State Laws in 1982, provides that generally, a forum must apply the limitations period of the state whose substantive law will govern the claim, unless the forum determines that the sister state's law is unfair. 12 U.L.A. at 52. "Unfairness" can occur under the act when the sister state's limitation period is "substantially different" from that of the forum and does not afford "a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim. . . ." *Id.* at 52. The principal draftsman of the Uniform Act, Judge Robert A. Leflar, has pointed to the precise situation Wiley Goad confronted in explaining why the Uniform Laws Commissioners chose to make an exception to their rule for cases where "unfairness" would result:

> Not all jurisdictions, however, have adopted the "discovery rule." In some, the statute is deemed to begin running at the moment the tortious act was done (when the tort occured), even though the victim could not know of the harmful consequences until some later time, perhaps after the statutory period had run. In these cases, a court of another state might well find "unfairness" in the first state's accrual rule, in that it "has not afforded a fair opportunity to sue upon . . . the claim."

Leflar, *The New Conflicts-Limitation Act*, 35 Mercer L.Rev. 461, 480 (1984). The rule for which Sun Oil contends here would make unconstitutional the escape hatch the Uniform Laws Commissioners left for cases of this kind.

As Sun Oil and GAF contend that the Constitution follows in lockstep with trends in choice-of-law analysis, the National Commissioners' recognition that a forum should be free to apply its own discovery rule must be made a part of any constitutional rule elucidated by this Court.[9] The discovery rule is eminently fair, and a forum's choice of the rule can never be unconstitutional.

If courts are suddenly to be put to the task of evaluating the constitutionality of applying their own statutes of limitations, an outcome-determinative test is ill-suited for such work. Proper analysis will focus on the nature of statutes of limitations. Under such analysis, the forum's use of its own rule will rarely be improper, and use of a local discovery rule will never offend the Constitution.

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9. The new Uniform Act is paralleled by an emerging trend simply to apply the longer of two conflicting statutes of limitations as a matter of policy to afford decision on the merits. *See, e.g., Tomlin v. Boeing Co.*, 650 F.2d 1065, 1072 (9th Cir. 1981); *Marshall v. Kleppe*, 637 F.2d 1217, 1224 (9th Cir. 1980); *Sprung v. Rasmussen*, 180 N.W.2d 430 (Iowa 1970); *Adams v. Little Missouri Mineral Co.*, 143 N.W.2d 659 (N.D. 1966); Okla.Stat.tit.12 §105 (1981). This trend also supports the conclusion that forum use of a discovery rule is per se constitutional.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, *amicus* Wiley Goad respectfully prays that the decision of the Kansas Supreme Court be AFFIRMED.

Respectfully submitted,

CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705

Brent M. Rosenthal pmca

BRENT M. ROSENTHAL*
CHARLES S. SIEGEL
BARON & BUDD
8333 Douglas Avenue
10th Floor
Dallas, Texas 75225
(214) 369-3605

Attorneys for Amicus Curiae

WILEY GOAD

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* Counsel of Record